

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

**BRIEF FOR APPELLANTS IN NO. 9404
AND JOINT APPENDIX**

IN THE
United States Court of Appeals

DISTRICT OF COLUMBIA.

—
No. 9404

530

CENTRAL DISPENSARY AND EMERGENCY HOSPITAL, OF THE DISTRICT OF COLUMBIA, et al.,
Appellants,

v.

MILDRED FRANCES SAUNDERS, et al., *Appellees.*

—
No. 9405

NORMAN B. SAUNDERS, *Appellant,*

v.

MILDRED FRANCES SAUNDERS, et al., *Appellees.*

—
Appeals from the District Court of the United States for the
District of Columbia.

*United States Court of Appeals
for the District of Columbia*

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IN THE

United States Court of Appeals

DISTRICT OF COLUMBIA.

No. 9404.

CENTRAL DISPENSARY and EMERGENCY
HOSPITAL, *et al*,
Appellants,

v.

MILDRED FRANCES SAUNDERS, *et al*,
Appellees.

Appeal from the District Court of the United States
for the District of Columbia.

BRIEF FOR APPELLANTS

JURISDICTION

This is an appeal by the Central Dispensary and Emergency Hospital of the District of Columbia, Garfield Memorial Hospital of the District of Columbia, Presbyterian Home for the Aged of the District of Columbia and the Washington Home for Incurables of the District of Co-

lumbia from a decree of the District Court of the United States for the District of Columbia entered July 2, 1946 in favor of the appellees upon a motion for judgment upon the pleadings. (App. p. 57).

This proceeding was instituted by the American Security and Trust Company, one of the executors of and as trustee under the will of Julia I. Saunders, deceased, for construction of the wills of Lorin M. Saunders and Julia I. Saunders (App. 3). Answers were filed by the interested parties (App. pp. 35-47); whereupon the American Security and Trust Company moved for judgment on the pleadings. (App. p. 48). This appeal was taken under the provisions of Title 17, Section 101 of the D. C. Code (1940 Ed.), and of Rule 10 (a) of this Court. The American Security and Trust Company, being virtually a stakeholder, is not a party to this appeal.

STATEMENT OF CASE

This is an appeal from a judgment of the District Court of the United States for the District of Columbia construing the will of Lorin M. Saunders, deceased.

Lorin M. Saunders died on May 15, 1905, survived by his wife, Julia I. Saunders, and one child, Fenton G. Saunders, who was born on April 24, 1892, and died on February 26, 1915, unmarried and without issue, leaving a last will dated May 3, 1913, by which he devised his entire estate to his mother, Julia I. Saunders. Julia I. Saunders died February 7, 1942, leaving a last will dated November 7, 1927, and codicils dated May 18, 1932, and February 10, 1936, by which she devised to the appellant charities her residuary estate.

The pertinent provisions of the last will and testament of Lorin M. Saunders are given below, with the paragraphs numbered for convenience in referring thereto.

1. "It is my desire that my residence property, situated at the northwest corner of Wyoming and Connecticut Avenues, in the subdivision known as Wash-

ington Heights, in the District of Columbia, shall remain in the name of Saunders, as a home for my wife and son, as long as possible, and I therefore give, devise and bequeath the same with all the furnishings therein to my wife, Julia Isobelle Saunders, that she may keep the same as such home as long as she may live, hereby giving her, my said wife, full power and authority to sell and convey the same in fee simple or otherwise, at any time she may deem it expedient and proper so to do; and the purchaser or purchasers of said property shall not be required to see to the application of the purchase money.

2. "And in case my said wife shall not sell or dispose of said property during her life, at her death it shall pass, and I bequeath the same, with all the furnishings therein, to my son, Fenton Green Saunders, with full power in him to sell the same when he arrives at the age of twenty-five years, if his mother is then deceased. It being my intention to give my said son the same power of disposition of said property after his mother's death, as she, my wife, shall have. And in case the said property is not disposed of by either my wife or son, it shall pass at his death, to such of his children, if any, as he may by will direct, and in case he shall not make such direction, it shall pass to such person or persons as would be his heirs at law.

3. "And after the payments of my just debts, I give, devise and bequeath all the rest, residue and remainder of my estate, both real and personal, of which I may die seized, to my wife, Julia Isobelle Saunders, in trust with full power to sell, mortgage, or convey the same in fee simple or otherwise, as in her judgment may be expedient, and the purchaser or purchasers thereof shall not be required to see to the application of the purchase money. And the income or proceeds of the sale of such property shall be applied and used for her support and maintenance, and for the support and education of my said son, it being my desire that he shall be given a college education.

4. "And when my said son shall arrive at the age of twenty-five years, I direct such of the remainder of my property, real or personal, other than the residence

property, then undisposed of and not used for, or necessary for the purposes of her maintenance or support aforesaid, shall be conveyed or given to him absolutely, if in the judgment of my said wife it is expedient so to do; but not otherwise. For if my said wife so desires, and shall deem it best for the welfare of our son, Fenton, she may keep the whole of said property for such time, after he arrives at the age of twenty-five and until she may deem it expedient to convey to him the real estate and give him the personal property then remaining, even though it be for her natural life.

5. "It is my desire that my said wife shall have full power and authority to dispose of any or all of my property whether real or personal when she may deem it for the best interest of my estate to do so.

6. "And that she may use the income, or principal from my estate if necessary for the proper support and maintenance of herself and my son, the amount so expended or used being left to her discretion intending only, that such part or the remainder of my estate, existing at the death of my wife, if not conveyed or turned over to my son, by her, prior to her death, as herein provided, shall pass to him or his heirs absolutely.

7. "And in case my wife shall die before our son, Fenton, reaches the age of twenty-five years, then I request that application shall be made to the court for the appointment of some suitable person to carry out the trust herein, provided until he reaches such age, at which time and in that event all of my property then remaining shall pass to and become vested in my son absolutely.

8. "And in case my said son shall die without leaving lawful issue, the whole of my estate, after the death of my wife, shall pass and descend to my heirs at law."

The appellants claimed that Fenton G. Saunders took a vested remainder in the portion of his father's estate which had not been used by his mother for the maintenance of herself, her son and the latter's education, and that said

*Appellants say
his son is
afterwards
which later
became vested.*

remainder passed to Julia I. Saunders by the will of Fenton G. Saunders.

The appellees claimed that the collateral relatives of Lorin M. Saunders took the residue of his estate under Paragraph 8 of his will.

The court ruled with the appellees and entered judgment directing the distribution of the testator's residuary estate to his collateral relatives.

STATEMENT OF POINTS

1. The court below erred in not holding that Fenton G. Saunders took an alternative vested fee in the residue of his father's estate.

2. The court below erred in holding that neither Julia I. Saunders nor Fenton G. Saunders took anything under the will of Lorin M. Saunders that they could dispose of by their wills.

3. The court below erred in not holding that Julia I. Saunders took under the will of Fenton G. Saunders the alternative fee devised and bequeathed to him by the will of Lorin M. Saunders.

4. The court below erred in holding that the appellants did not take under the will of Julia I. Saunders the residuary estate of her husband devised and bequeathed to her by her son Fenton.

5. The court below erred in holding that the heirs at law of Lorin M. Saunders were to be ascertained as of the date of the death of Julia I. Saunders and not as of the date of his own death.

6. The court below erred in ruling that under the will of Lorin M. Saunders his collateral relatives took his residuary estate.

7. The vested remainder devised and bequeathed to Fenton G. Saunders or his heirs by paragraph 6 of his father's

will could not be cut down or defeated by the provisions of paragraph 8 of the will.

8. The court below erred in not holding that the testator's residuary estate passed and descended to his heirs at law as intestate property.

SUMMARY OF ARGUMENT

By the provisions of paragraph 6 of the will of Lorin M. Saunders he devised to his son Fenton an alternative vested fee in so much of his estate as had not been used by his widow for her support and that of his son, as well as for the latter's education. This vested remainder passed to Julia I. Saunders by the will of Fenton G. Saunders and by her will to the appellants under its residuary clause.

If it be contended that Fenton G. Saunders took only a conditional estate, subject to be defeated if he died during the life tenancy of his mother, then it follows that his mother, as his only heir, would take by succession the estate primarily devised to him. The estate thus taken by the widow passed to the appellants under the provisions of her will.

The heirs of Lorin M. Saunders must be ascertained as of the date of his death, unless his will clearly designated some other date. He did not by his will designate any other date, clearly or otherwise. In the absence of a clearly expressed intention to the contrary, it will not be assumed that the testator intended to exclude his only son from the class designated by him as "my heirs at law", and thereby disinherit his only heir.

The alternative vested remainder devised to Fenton G. Saunders or his heirs by paragraph 6 of his father's will could not be cut down or defeated by any subsequent provision of the will unless the language of the later provision is as clear and imperative as that of the former.

If the specific provisions made for the testator's wife and son failed, he was content to let the law take its course

and his property pass as directed by the statutes of descent and distribution. Thus his son Fenton, as his only heir, took his residuary estate.

ARGUMENT

The devise in paragraph 6 of the will of the remainder of the estate to Fenton "*or his heirs*" is an alternative estate, the creation of which is authorized by Sec. 813, Title 45 of the 1940 D. C. Code which provides:

"Two or more future estates may be created to take effect in the alternative, so that if the first in order shall fail to vest, the next in succession may be substituted for it and take effect accordingly."

There is nothing in the will to indicate that the testator did not use the word "*or*" understandingly and designedly. It may be assumed the testator knew that a simple devise of the remainder of his estate to Fenton would lapse if the latter died without issue *during the testator's lifetime*.

Lorin M. Saunders realized that, having by the sixth paragraph of his will, devised a vested remainder to his son *or his son's heirs*, this devise would not lapse if his son predeceased him *leaving issue*, and that only in the event the son should predecease him *leaving no issue* was it important to provide for disposition of the remainder. And it was for this reason that he provided that it should go to his *son's heirs*, whoever they might be *according to the law of descent*.

The language by which he devised the remainder to his son is extremely significant:

"that such part or the remainder of my estate existing at the death of my wife, if not conveyed or *turned over* to my son, by her, prior to her death as herein provided, shall pass to him, *or his heirs absolutely*."

Obviously he must have contemplated that the son might not be living at the time of his mother's death and there-

fore he used the alternative "*or*" his *heirs*—not issue, but "*heirs*."

He could not have said more plainly that if his son should be living at the time of his mother's death possession of the remainder was to be turned over to *him* but if he had previously died then it was to go to *his son's heir*, who was his mother.

In the case of his residence property, he wished it to remain as a home for his wife and son and he gave his son a power of appointment by will to his son's children *if any*, in default of which it should pass to *his son's heirs at law*.

This is precisely the same disposition he made with respect to the unclassified remainder except that he had no wish to so curtail the exercise of discretion as to alienation of the unclassified remainder.

It is certainly obvious from a consideration of the entire will that the testator had in mind, above all else, the interest of his wife and son; he expressed nowhere any interest or concern for any others, whether collateral relatives or otherwise. He recognized that his wife, who was as much interested in their son as he was, would act in the best interest of their son. At the same time he did not wish her to be hampered in the use of his estate, both principal and income, for he gave her complete control during her life to the end that her needs and comforts would be fully met, and that their son should get all the advantages of education and the comforts of life which his mother might think proper for him, even to the extent that when he reached the age of twenty-five she might, if she saw fit, release to him the full use of the property, or any part of it, in which he had given the son a vested remainder. There is nothing to indicate that the testator intended to limit the enjoyment of this vested remainder by his son. To be sure, the proceeds of any sale or other alienation of this remainder could only be used by the son with the approval of his mother during her lifetime; and any other limitation would have

hampered the purpose which the testator has so clearly expressed.

Such an interpretation of his intention, insofar as it can be found from the language of his will, is certainly consistent with his wishes and intentions otherwise clearly expressed, and any other interpretation is inconsistent with such intention.

The contention of the appellants that Fenton, having survived the testator, took a vested fee simple estate, has been sustained by the courts of Pennsylvania and Illinois as appears from the following cases.

In *Bender v. Bender*, 226 Pa. 607; 75 Atl. 859, Philip Bender by his will devised to his wife an estate for life in all his property. The remainder in a house and lot he devises to his son Johannes Bender *or his children*. Johannes, who was twice married, had a son, the plaintiff in the cause, by his first wife. Johannes having survived the testator, by his will devised the property in dispute to his second wife. The son claimed that Johannes took only a life estate and that he was entitled to the remainder. The court held that Johannes, having survived the testator, took a fee simple estate which passed by his will to his second wife. See also *Gilmore's Estate*, 154 Pa. St. 523; 35 Am. St. Rep. 855.

In *Pearson v. Olson*, 310 Ill., 252, the testator devised his entire estate to his wife for life with the remainder to his daughter "*or heirs of her body*." The daughter, who survived her father, contracted to sell the property involved, but the purchaser declined to complete the deal, claiming that the daughter did not have good title to the property. The court ruled that she took, under the will, a fee simple estate, and decreed specific performance of the contract of purchase.

In some other states in which the question has arisen the courts, while holding that a devise to one *or his heirs*, after a life estate in another, vests in the devisee a conditional estate only, subject to be divested if he predeceased the tenant of the life estate, have held that in the latter event

the estate passes to the primary devisee's heirs. Such are the cases of *Reiff v. Strite*, 54 Md. 298 and *Shriver v. Shriver*, 127 Md. 486.

It must be noted, however, that Section 813 of Title 45 of the local code, above quoted, contains no exceptions or conditions affecting the vesting of the interest in the primary devisee named in an alternative devise. Here the primary devisee was in being and ascertained at the date of the death of the testator.

It therefore seems clear that under the will of Lorin M. Saunders his residuary estate passed either to his son as the primary devisee, or to his widow as the son's heir, and thence by the widow's will to the appellants.

The estate devised to Fenton was vested in right, notwithstanding full enjoyment was postponed until he reached twenty-five years of age, or the death of his mother.

In *McArthur v. Scott*, 113 U. S. 340, 379; 28 Law Ed. 1015, it was said:

"Where a remainder is so limited as to take effect in possession, if ever, immediately upon the determination of a particular estate, which estate is to determine by an event which must unavoidably happen by the efflux of time, the remainder vests in interest as soon as the remainderman is in esse and ascertained; provided nothing but his own death before the determination of the particular estate will prevent such remainder from vesting *in possession*. *Doe v. Considine*, 6 Wall., 458.476. * * * Words directing land to be *conveyed* to or divided among remaindermen after the termination of a particular estate are always presumed, unless clearly controlled by other provisions of the will, to relate to the beginning of enjoyment by the remaindermen, and not to the vesting of the title in them."

Richardson v. Renicks

1 App. D. C. 261

In *Fields v. Gwynn*, 19 App. D. C. 99, 113, it was said:

"The character of the estate created in them must be tested by their present capacity to take should the life estate be suddenly terminated. *That they may not survive the life tenant, and, therefore, never come into the enjoyment of the estate, is immaterial.* It is not the uncertainty of the enjoyment, but the uncertainty of the right that distinguishes the contingent from the vested remainder.

The limitation in remainder is to persons in being and of certain ascertainment. The limitation of the preceding life estate is an event that must certainly happen in the ordinary course of nature, and that may, and most probably will, happen before the death of her issue or the survivor of them.

Upon the sudden termination of the preceding estate they would at once come into the enjoyment of the remainder.

It only remains to add *that the mere vesting of the legal title in a trustee offers no ground for a different construction.*" (Emphasis supplied)

In *Green v. Gordon*, 38 App. D. C., 443, 454, it was said:

"To the same effect are the established rules of construction announced in *Doe ex. dem. Poor v. Considine*, 6 Wall. 458, 475, 18 L. ed. 869, 874, as follows: 'The law will not construe a limitation in a will into an executory devise when it can take effect as a remainder, nor a remainder to be contingent when it can be taken to be vested. It is a rule of law that estates shall be held to vest at the earliest possible period, unless there be a clear manifestation of the intention of the testator to the contrary. Adverbs of time,—as *where, there, after, from*, etc.,—in a devise of a remainder, are construed to relate merely to the time of the enjoyment of the estate, and not the time of the vesting in interest.' "

In *Grace v. Continental Trust Co.*, 169 Md. 653; 182 Atl. 573, it was said:

"In doubtful cases the interest should be held to be vested rather than contingent, unless the instrument

under consideration does not admit of such construction. The general principle is that any devise or bequest in favor of a person or persons in esse, whether such persons be individualized or treated as a class, confers an immediate vested interest upon the death of the testator, although the time of possession or enjoyment may be postponed, unless there be some clearly expressed desire or some manifest reason for suspending or deferring the time of vesting."

In the instant case the will provided for the maintenance and education of Fenton from the estate devised until the estate was turned over to him. His estate was therefore vested.

The heirs of a person are to be determined as of the date of the death of the decedent unless the will clearly designates some other date.

Ordinarily, and in the absence of expressions showing a contrary intent, the heirs of a person are to be determined as of the death of the decedent. Many reasons support this rule, not the least of which is that the law favors the vesting of property, even though its enjoyment be deferred, rather than its suspension until the happening of a contingency. It is also recognized that, where there is ambiguity, that construction should be followed which most nearly accords with the statute of descent, which of course contemplates heirs as of the date of the death of the decedent.

Costello v. Costello, 80 U. S. App. D. C. 75; 149 F. (2d) 379.

In re White's Will, 209 N. Y. Supp. 433.

In 3 Page on Wills, Sec. 1054, p. 224 et seq. it is said:

Where the class of beneficiaries is described as "heirs" or "next of kin" of the testator, the class must be determined as of the death of the testator, unless the will plainly indicated otherwise. This is due to the fact that such a class imports descent or succession

under the statute of descent and distribution. Rights under the statute are determined as of the death of the testator; and the class is, *prima facie*, fixed as of such time.

The same rule applies where the gift over is to those who would take if there were no will.

This rule applies where there is a gift over after a life estate, *or a gift over in case the first taker dies without issue surviving at his death*, or a provision for distribution among the heirs of testator at a specified time, or a gift of any surplus left after paying annuities.

A reference to the statute of descent and distribution strengthens the inference that "heirs," or some word of similar import, means those who answer that description at the death of the testator. (Emphasis supplied)

The will in this case not only did not clearly designate a future date for the ascertainment of testator's heirs, but did not indicate any future date at all, clearly or otherwise.

Here the testator did not, as in *Costello v. Costello*, *supra*, expressly provide that his estate should *pass and descend* to those persons who would be his heirs either at the date of the death of his son, or that of his widow. On the contrary, he fairly indicated his intention that his estate should go either to his heirs in the descending line or as intestate property. As so read, the word "descend" is given its usual as well as legal meaning. If either be the true construction of the language employed in paragraph 8 of his will, the result is the same, and his heirs are to be ascertained as of the date of the death of the testator. If the former, his son, Fenton, being his only heir in the descending line, took by devise his entire estate, subject only to the life estate of the widow. If the latter, his property followed the same channel into which the law would direct it, and Fenton would inherit as heir.

In *Evans v. Okershausen*, 69 U. S. App. D. C. 385, 392; 100 F. (2d) 695, the Court said:

"The primary significance of words should ordinarily attach and does attach, unless it is manifest from the will itself that other definitions are intended. Weight and meaning must be given to every word used if they make any sense at all. None are to be deleted and none added, for men make their own wills, nor should we search out obscure or recondite possibilities in simple words."

In no other part of his will does the testator use the word "descend." There is nothing in the language elsewhere employed by the testator to indicate that he did not clearly understand the usual meaning of the word, or that he used it in any sense other than that ordinarily attached to it.

In *Halstead v. Hall*, 60 Md. 209, in speaking of the meaning to be applied to the word "descend" in a will, it was said:

"Its employment, therefore, unless some other meaning is apparent, is to be taken as indicating the desire of the testator that his property shall follow the channel into which the law would direct it."

— In *Dove v. Tore*, 128 Mass. 38, 40, the devise was to daughters of testator or the survivor of them for life or until marriage. Upon marriage of any one of the daughters her life estate was terminated. After the death or marriage of the surviving daughter, "the estate herein devised shall *descend* to those persons who may *then* be entitled to take the same as my heirs." It was held that the word "then" was not used

"by the way of the description of the persons who are to take, but by way of defining the time when they shall come into the enjoyment of that which is devised to them. * * * Nor is the devise to those who would have been the testator's heirs at law if he had died at that time * * * A devise to 'heirs' or 'heirs at law' is always construed as referring to those who are such at the time of the testator's death, unless a different intent is plainly manifested by the will. * * * The application

of this rule to the present case is fortified by the use of the word 'descend', which ordinarily denotes the vesting of the estate by operation of law in the heirs immediately upon the death of the testator. Upon a view of the whole clause, we are of the opinion that it manifests the intention of the testator to have been that, after the particular estates which he had specifically given by his will should have failed, the law should take its course, and his estate go to his heirs, as if he had made no further disposition."

In *Baker v. Baker*, 8 Gray (Mass.) 101, 119, 120, Shaw, C. J. said:

"The verb 'descend' is sometimes used in the sense of 'pass by descent or inheritance', or 'be inherited by.' * * * But when so used, it is usually accompanied by other words, which prevent all ambiguity. These phrases are, 'shall descend to his father,' 'to his mother,' 'to his next of kin,' which may be in the ascending or collateral line, as well as the descending; but in those cases these terms so qualify the word 'descend' as to give the effect of 'pass by inheritance' to the person named or described. We are aware of no authority, that either in a direct gift by will, or in a declaration of trust to the descendants of a person named, such bequest or declaration of trust would be construed to include, as a *descriptio personarum*, the heirs generally of such person, including ancestors and collaterals. There must be clear indications in other parts of the will that it was so intended by the testator, to warrant such a construction. * * *"

Fenton was not excluded from the class designated by the testator as "my heirs at law" in the 8th paragraph of the will.

The words "shall pass and descend to my heirs at law" appearing in the 8th paragraph of the will should not be construed to mean that the testator thereby intended to exclude, as an heir, his only child Fenton, unless the language employed is so clear as to permit of no other reason-

able construction. Clear language is necessary to disinherit an heir, and the courts will resolve any reasonable doubt in his favor.

—In *Wright v. Dean*, 10 Wheat. 205, it was said:

“For the law will not suffer the heir to be disinherited upon conjecture. He is favored by its policy; and though the testator may disinherit him, yet the law will execute that intention only when it is put in a clear and unambiguous shape.”

In *Wilkins v. Allen*, 18 How. 385, 15 U. S. (L. Ed.) 396, it was said:

“In speaking of expressions in a will necessary to disinherit the heir, Chief Justice Gibson in delivering the opinion of the court in the case of *Bradford v. Bradford*, 6 Whart. (Pa.) 244, says: ‘The intention must be manifest, and rest on something more certain than conjecture. The court must proceed on known principles and established rules, not on loose conjectural interpretations, *nor considering what a man may be imagined to do in the testator’s circumstances*. The principle is applicable in all its force in a case like the present, in which the question goes to the birthright of those who, standing in place of the common law heir, are not to be disinherited except by *express devise*, or, as is said in *Powell on Devises* 199, by implication so inevitable that an intention to the contrary cannot be supposed.’”

Allen v. Reed, 57 App. D. C. 78, 80; 17 F. (2d) 666.

In *Doe v. Halloway*, 2 Houst. (Del.) 527, the court said:

“Heirs at law are not to be disinherited, or debarred of their right to claim his lands by operation of law, or by descent and inheritance, as it is usually termed, *without express words, or a clear and certain intent apparent upon the face of the will*. For in order to make such a devise of real estate as will disinherit an heir at law, or deprive him of his right to inherit, independent of the will, such an intention must appear, or be clearly indicated in it, as is sufficient to satisfy

the mind and conscience of the court in pronouncing it such. If it is barely problematical, *or is doubtful, or uncertain*, the rule of law must have its course and control the disposition of the estate, notwithstanding the provisions of the will. *Roe v. Blackett*, 1 Cowl. (Eng.) 240. Because it is a rule of universal application in the construction of wills that whenever there is an irreconcilable uncertainty or repugnancy in the dispositions made by a testator of his real estate, the title of the heirs at law shall be preferred to all others; because where a court cannot find words in a will, which either expressly or by necessary implication, denote the testator's intention, beyond *the possibility of a doubt*, the rules of law directing descents, which are certain, must prevail and can never be superseded by an uncertain devise."

Here the will contained no express devise to his collateral relatives, nor is there a clear and certain intent apparent upon the face of the will to disinherit Fenton, his only son, in favor of his collateral relatives, who are not even mentioned in the will.

If, on the other hand, by the language employed in paragraph 8 of the will, particularly the word "descend," the testator intended that, having made provision for his wife and son as far as his foresight would enable, he was content to let the law take its course, and his estate descend as if he had died intestate thereof, Fenton took the estate by inheritance as shown by the following cases:

In *Gilman v. Congregational Home Missionary Society*, 276 Mass. 580, decided in 1931, the testator died in 1894 leaving a daughter who was testator's sole heir, and who at the death of testator had two children. He gave the residue of his estate to his daughter "for and during the term of her natural life only", to apply the income and principal for her maintenance and support, said rest and residue to be given on her death to her children or their issue living at her death, and if she died leaving no issue,

then her present husband was to hold the said rest and residue for and during the term of his natural life only, and at his death or at the death of the daughter if she survived her husband and died without issue, *then* and in such case the said rest, residue and remainder of his estate was to go to his heirs at law.

The daughter died in 1929, testate, leaving no husband or issue surviving her.

Upon a petition in the Probate Court for distribution, a decree was entered directing distribution among those who would have been testator's heirs at law had he died immediately after the daughter. A legatee under the will of the daughter appealed.

It was held that the heirs at law of the testator were to be ascertained at the date of his death and that—

“The fact that the life tenant may be one of the heirs at law, or even the sole heir at law, is not such an incongruity as to prevent the usual meaning of the word from being applicable. The word ‘then’ as used in the will is not descriptive of the time when the heirs of the testator are to be ascertained, but denotes the time and occasion for distribution.

The use of the words ‘heirs at law’ instead of ‘heir at law’ is of slight importance as indicating that the heirs are to be determined on the death of the life tenant.”

In *Whall v. Converse*, 146 Mass. 345, there was a bequest of income from a trust fund to the wife of the testator until her death or remarriage, and, in either event, to his son and daughter, the principal, if the wife survives them and their issue, if any, to go on her death as she may direct by will, or in default of a will, then to the testator's *heirs at law*. It was held that the bequest over was to those who were the heirs of the testator at the time of his death. The court, Holmes, J., said:

“If the daughter dies intestate and without issue, and the son die without issue leaving his interest in the trust fund to a third person, who assigns to the widow, the latter who has never married again takes the whole fund.”

In *Minot et al. v. Tappan et al.*, 122 Mass. 535, a devise was made to trustees to pay the income to the testator's son George for life and to his widow and children. In default of any such child, children or issue then living, “then to my heirs at law.” George had a brother Granville who survived the testator, but predeceased George. It was held:

“We must therefore hold, according to the great weight of the authorities, that this limitation to the testator's ‘heirs at law’ imports his heirs at law at the time of his death.

Upon this construction it follows that Granville T. Winthrop took at the death of his father an interest in this trust fund which he might alienate. There was no contingency as to the persons who were to take; they were the heirs at law of the testator ascertained at his death. The contingency upon which the vesting of his interest in possession depended was the event of his brother George dying without leaving a widow or issue, but it vested in right upon the death of the testator, and was capable of alienation.

In *Kenyon, Petitioner*, 17 R. I. 149, a devise was made to B and his heirs for and during the life of C, who was the son and sole heir of the testator, in trust for C and after the death of C, to the right heirs of the testator. Collateral heirs of the testator living at the death of C claimed to answer the description of right heirs of testator. It was held:

“The great obstacle to the construction contended for by the heirs at law is that the estate was given by the testator in remainder to his ‘own right heirs,’ and the son alone answered to that description at the testator's

death. We are bound to hold that the words were used in their proper technical meaning until the contrary clearly appears.

Our conclusion is that said second clause does not show clearly an intent on the part of the testator to have the property given thereby go, after death of his son, to the persons then answering to the description of his own right heirs..”

In *Tuttle v. Woodworth*, 62 N. J. Eq. 532, bonds and stock were devised to executors to hold for the use of the widow and daughter of the testator and to pay the income therefrom to the widow for life, “and after her death to set off the said bonds and stock to my daughter Hattie, or her heirs. If the said Hattie shall die without issue her surviving, or children of such issue, then said bonds and stocks shall revert to my estate and be distributed among my heirs, in the manner provided by the laws of New Jersey respecting intestate estates.”

Hattie survived the testator, and died during her mother's life, unmarried and without issue, having devised her interest under the will to her mother. The testator at the date of his death had three living heirs, a son who died during his mother's life leaving a daughter, Mrs. Dorset, and two daughters, Caroline (now Mrs. Woodworth) and Hattie.

Mrs. Dorset and Mrs. Woodworth claimed to be the heirs of the testator ascertained at the death of the widow.

On the other hand it was claimed by the assignees of Hattie's interest that upon the death of the testator she took an absolute vested estate subject only to her mother's estate.

The claim was also made that since Hattie was devised the particular estate for life, it must be assumed that this was all the testator intended she should take, and therefore she should be excluded from the class to take the remainder as heirs. This contention was rejected.

It was also contended that it would be incongruous to hold that the life tenant is entitled to any interest in an estate as next of kin, after the estate specially given to him by the will has been terminated. This contention also was rejected, the court saying that

“when the testator limits an estate to one of his next of kin and his children or issue, and then directs that, on failure of this limitation, his heirs or next of kin shall take according to law, he discloses clearly that, if the special and immediate limitation fail, as it may, then he had no intention or wishes to change the disposition which the law itself would have made for him in regard to this part of his estate, and that on failure of his special purpose, he desires that he should be considered as making no provision of his own about the disposition of his estate, but as expressly leaving that disposition to be made by the laws as if he had died intestate.”

It was held that the daughter Hattie took a vested estate which passed by her will to her mother.

In *Tatham's Estate*, 250 Pa. St. 269; 95 Atl. 520, the testator bequeathed his residuary estate to his executors in trust for his widow and sons during the widow's life, and, in case of the death of the sons before their mother, for the benefit of their children or widows, and, if they died leaving neither issue nor widows, the entire residuary was given for the use of the widow for life. The will gave testator's wife a power of appointment, and provided that, if such power be not exercised, “I . . . bequeath the entire reversion to my lawful heirs and distributees as provided by the intestate laws.” A codicil revoked the power of appointment, except as to \$30,000, and provided: “And as to the . . . remainder of my estate and as to the whole of it, in case my wife makes no such appointment, I . . . bequeath the same to my executors and trustees and the survivor and heirs of the survivor of them, as named in my will, in trust, to distribute the same—in case my sons

are both dead, leaving at the time of the death of my wife no lawful issue surviving—to my own right heirs and distributees as provided by the intestate laws.” The sons died before their mother, leaving no lawful issue surviving them. It was held that the “right heirs and distributees” of testator were to be ascertained as of the date of his death, and not as of the date of the death of the widow, and that the residue should be awarded to the estates of the two sons to the exclusion of collateral heirs. In the course of the opinion the court said:

“That the class described as testator’s ‘heirs’, to whom a remainder or executory interest is given by a will, are to be ascertained at the death of the testator, is admittedly the general rule. This is so well recognized that nothing but the expression of a clear intention to the contrary in the will can be allowed to alter the rule. In one of our latest cases in which the subject was considered, *In re Bache*, 246 Pa., St. 276, 92 Atl. 304, Mr. Justice Mostrezo said (p. 279): ‘It is settled by a long line of decisions in this State that a devise of real estate to one for life with remainder to the testator’s heirs vests the remainder in those who answer such description at the time of his death unless the will affords clear and unequivocal evidence to the contrary; and it is immaterial that the life tenant is one of the class who will take the remainder.’

The question then to be determined is, whether anything is to be found in the will or codicil of George N. Tatham which clearly indicates that in using the expression ‘my own right heirs’, he did not refer to such persons as were his heirs at the date of his death. We have looked in vain for anything to show that the testator used the word ‘heirs’ in any other than the ordinary sense. The relationship was at once fixed, at the date of his death. He gave his estate to his ‘own right heirs and distributees, as provided by the intestate laws.’ None but those upon whom the law cast the descent at the date of testator’s death would answer to that description. It adds no weight to the argument against giving to the words their natural and legal significance to say that testator has only done that which the intestate law would have done for him. It

was his privilege to say that under certain circumstances he was content to have his estate go in accordance with the intestate laws. Nor will it do to say that the application of the settled rule will in this case lead to peculiar and unusual results, which the testator would perhaps have wished to avoid, had they occurred to him. With the results of testator's action, in so far as it may take property from one line of descent and place it in another, we have nothing to do. If the testator had really meant that his estate should go to collateral heirs, or to those who might have been his heirs, had he outlived his wife and his two sons, he could easily have said so. We find nothing in the context to control the natural meaning of testator's words or to indicate, much less to demonstrate, that he intended to exclude the tenants for life, from his description of his 'own right heirs and distributees.' Upon its facts we are unable to distinguish the present case from *Stewart's Estate*, 147 Pa. St. 383, 23 Alt. 599. The principle there discussed and applied is directly in point here, and requires us to hold that when the testator directed that his estate should go to his 'own right heirs and distributees' he meant the persons who would have taken as such at the time of his death. That class as then constituted consisted of the widow and two sons."

In *Kellett v. Shepard et al.*, 139 Ill. 433, Nelson Stillman died testate leaving surviving his widow and two children, Charles P. and Mary Louisa Stillman. The widow subsequently married Thomas P. Kellett, and is the appellant herein. The son died intestate after the death of his father without children or descendants of children, but leaving a widow. The daughter died testate after her father's death, leaving neither husband, child nor descendants. Of the residue of his estate one-half was to be set apart by the trustees and the income paid to the daughter for life, the principal to be so conveyed that after her death it should descend to her child or children, if any, but in case she had no issue, to go and *descend* to "my heirs at law." The balance of the residuary estate was to go to son when

he attained to age of 30 years. The income to be paid to the son until he reached 30 years.

The suit was brought by sisters and brother and nephews and nieces of testator for partition of property and construction of will. Appellees, plaintiffs below, contended that they were the heirs at law of the testator when his daughter, Mary Louisa died, and are therefore owners of the estate.

The lower court decreed that heirs at law of the testator must be ascertained as of date of the death of the daughter and not as of the date of the death of testator. On appeal it was held:

“The estate set apart for the use of the daughter vested in the son and daughter, as heirs at law of their father, at the time of his decease. The reversionary estate, vested in the heirs at law at the testator’s death, was liable to open to let in her children in case she should have any, but in the meantime it subsisted in the heirs for the purpose of drawing the possession to them in the event of her death without children. The law always gives preference to vested over contingent remainders. It does not favor the abeyance of estates. Estates in remainder vest at the earliest possible period unless a contrary intention on the part of the testator is clearly manifested. Where it is a remainder after a life estate it is regarded as a vested remainder, and the possession only is postponed. The fact that the gift or devise must open to let in after-born children is not inconsistent with the vesting of the estate in interest at the testator’s death, though the vesting in possession is deferred to the period of distribution.” See *Holloway v. Holloway*, 5 Ves. 399.

The estate devised to ‘my heirs at law’ is precisely the estate the heirs at law would have taken by descent if the devise had been omitted from the will. Title by descent is regarded as worthier and better title than the title by devise or purchase.”

In *Henkins v. Henkins*, 287 Ill. 62, 65, the court said:

“The words ‘after the death of such child’ refer not to the time of ascertaining the persons who may

be *entitled* to the estate but to the time when the estate shall be distributed. The rule is that when the will speaks of a devise as taking effect after or upon the death of the tenant of the particular estate, such words will ordinarily, if standing alone in the will, be construed as referring to the time when the estate will vest *in possession*, only.

In *Himmel et al. v. Himmel et al.*, 294 Ill. 557; 128 N. E. 641, Mary Marshall made her last will and testament on April 2, 1908, by which she devised all of her real estate in trust for Horace S. Marshall, her son and only child, until he should arrive at the age of 30 years, when the trust was to terminate and he was to have all the real estate for and during his natural life. And "upon the decease of my said son I hereby direct that all my said real estate heretofore devised to him for and during his natural life vest in fee simple in the issue of my said son surviving him, the descendants taking the share of any deceased child of said testator, but should he die without leaving issue surviving him, then it is my will that such real estate revert and go to my heirs as if no will had been made."

Mary Marshall died on February 8, 1913, and the will was admitted to probate in the county court of Mason County. Horace S. Marshall was the only child ever born to Mary Marshall and was her only heir at law at the time of her death. He married Sara E. Marshall and died on November 23, 1918, *at the age of 26 years*, without leaving issue surviving him. The appellees, who were half brothers and sisters of Mary Marshall, filed their bill alleging that they and the defendant Charles E. Himmel were each the owner of $\frac{4}{28}$ s, and the four children of Emma Budke, a deceased half-sister of Mary Marshall, were each the owner of $\frac{1}{28}$ of the real estate in fee simple, and praying for partition. The controversy was whether the devise of the remainder was to those who were heirs at law of Mary Marshall at the time of her death, or were such heirs at law at the death of Horace S. Marshall, when the life estate termi-

nated; and the claim of the complainants was that the members of the class were to be ascertained at the termination of the life estate, which would exclude Horace S. Marshall and his heirs at law. The court said:

"... The position of appellees is that, inasmuch as Horace S. Marshall was the sole prospective heir of Mary Marshall at the time the will was made, and was her sole heir at law at her death, her intention was to exclude him, and that her heirs at law should be determined at his death on the termination of his life estate. ... It is the established law of this state that where a life estate is devised to one of several heirs at law of the testator with remainder to his heirs at law, the life tenant is included within the term 'heirs at law', and is included in the devise of the remainder. *Kellett v. Shepard and Smith v. Winsor*, *supra*; *Downing v. Grisby*, 251 Ill. 568, 96 N. E. 513.

... The provision of the will of Mary Marshall was that upon the death of her son Horace S. Marshall, without leaving issue surviving him, the real estate was to go to her heirs as if no will had been made. By the will she clearly manifested an intention to give her son a life estate, and to secure and preserve to his issue surviving him a remainder in fee, and on failure of that limitation she had no intention or wish to change the disposition which the law would have made in regard to her estate, and she was to be considered as making no provision different from the laws of *descent*, and leaving the property to be disposed of by such law as if she had made no will. She expressed in her will all that she desired in the way of limitation of the estate to her son for life and the fee to his issue, if he should have any, and if the fee did not go to his issue, her will was that the real estate should go to her heirs in the same manner as intestate estate. There is no positive or substantive rule of law, based on the fact that Horace S. Marshall was the sole heir of the testatrix, which interferes in any manner with the disposition of the real estate according to the intention expressed by the testatrix, and the persons who are her heirs at law, and would have taken the estate if no will had been made, were ascertained at her death.

Horace S. Marshall, the sole heir at law of the testatrix, would have taken the estate if no will had been made, and, the limitation to his issue having failed by his death without surviving issue, his widow, Sara E. Marshall, took one-half in fee and the other one-half descended to his aunts and uncles living at the death of the testatrix, and the heirs and devisees of those who have died since."

In *Stokes v. Van Wyck*, 83 Va. 724, the will gave the daughter of testator and her husband joint life estates in certain lands, and if the daughter should die leaving issue, at her death the estate was devised to such issue and their heirs, after the termination of the life estates. If the daughter should die without leaving issue, then after the death of the son-in-law the land should "*pass and descend to my heirs*, according to the laws of descent in Virginia, and to their heirs forever." At the testator's death his daughter was his sole heir at law. Her husband died in 1854 and she died in 1884 without having issue. The testator had one brother and one sister. The plaintiffs were the descendants of the brother and sister and are the heirs at law of the testator at the death of his daughter in 1884. The daughter sold the land in '1857, and in 1885 the descendants of the brother and sister of the testator brought an action in ejectment.

It was held that the limitation over to the heirs of the testator referred to his heirs at the time of his death in 1834 and not to those who might be his heirs at the time of 'his daughter's death in 1884. The court said:

"What estate did Mrs. Walks (the daughter) take under said sixth clause? The answer to this question necessarily depends upon the testatorial intention to be gathered from the will itself, *and nothing else*, if that instrument is intelligible and not obnoxious to any recognized rule of law. But it must be borne in mind, however, that the true inquiry is not what the testator meant to express, but what the words used by him do express. *Burke v. Lee*, 76 Va. 389. And it must also be

remembered that though the testator's intention, when ascertained, is implicitly obeyed, however informal the language in which it is conveyed, yet the courts in construing that language always resort to certain established rules—rules deeply imbedded in 'the law by which particular words and expressions, standing unexplained, have acquired a definite legal signification which does not always comport with their popular acceptance.

Not even once in his will did the testator allude to his brother and sister or their descendants. Why, then, should he be supposed to have intended the property ultimately for them, in the event his daughter should die without issue, when he failed to say so, and when they are not referred to in his will. There is no expression employed in the will that indicates in the least degree any purpose to designate *as the class of persons* who should take the estate at the death of the testator's daughter, without issue, those who would be his heirs at law at her death. He says: 'But if my said daughter should die without leaving such issue, then my will and desire is that after the death of my son-in-law, David M. Walks, that the land and plantation should *pass and descend to my heirs* according to the laws of descent in Virginia.' Here there are no words pointing to heirs at a future period. The word then is not here used as an adverb of time. It evidently means 'in that event'—that is, in the event his daughter died without issue. 3 Jarman 683.

There is nothing favorable to the plaintiffs in error in the testator's use of the plural word 'heirs' nor can its use exclude the idea that the testatorial intent was to limit the estate to the daughter, who was the *sole heir*."

The Supreme Court of New York *In the Matter of Bump*, 234 N. Y. 60, upon similar facts reached the same conclusion as in the cases above. This case was followed by *In re Cohen's Will*, 40 N. Y. S. (2d) 892; *In re Holman's Estate*, 48 N. Y. S. (2d) 609, decided June 7, 1944, and *In re Wilson's Will*, 48 N. Y. S. (2d) 835, decided April 6, 1944.

If the testator really meant that his estate should go as if he had died intestate as of the date of his wife's death, he could easily have said so. There is nothing in the context to control the natural meaning of the testator's words "pass and descend to my heirs at law," or to indicate, much less to demonstrate, that he intended to exclude his son from his description of "my heirs at law." And if, by the use of those words, he meant that his estate should go as if he had died *intestate* thereof, as of the date of his own death, then clearly under Section 103 of Title 18 of the 1940 Code the appellees could not take, for that section provides:

"No right in the inheritance shall accrue to or vest in any person other than the children of the intestate and their descendants, unless such person is in being and capable in law to take as heir at the time of the intestate's death; but any child or descendant of the intestate born after the death of the intestate shall have the same right of inheritance as if born before his death."

The reference to the death of Fenton without leaving lawful issue, appearing in the 8th paragraph of the will, is to his death during the lifetime of the testator, and not to his death at any time thereafter, no matter how remote.

In Page on Wills, Vol. 3, Sec. 1292, p. 784 et seq. it is said:

Where the testator devises property to a named beneficiary in fee, with the condition that if this beneficiary shall die "without issue," "without heirs," "without children," and the like, the property devised shall go to some other designated person, the first question to consider is whether this is a devise upon condition or not. The weight of modern authority is that "die without issue," etc., without anything further in the will to indicate the intention of testator, and when inserted in order to provide for a gift to another in the event of dying without issue, *means death in the lifetime of testator*. Accordingly, if the beneficiary named in the will dies before the testator, neither his estate nor his

heirs can claim any interest in the devise, *while, if he survives testator, he takes an absolute fee simple free from any conditions*. By this construction these words are not strictly conditions, but rather directions for substitution in order to prevent lapse; and, if at the death of testator, *the designated beneficiary survives him, he takes the estate given absolutely, and is not divested thereof by his subsequent death without issue, but it passes by his will, or descends as his property in case of intestacy*.

Bland v. Davisson, 77 W. Va. 557; 88 S. E. 1021.

As supporting the foregoing rule, see also the following:

O'Brien v. Dougherty, 1 App. D.C. 148

Lumpkin v. Lumpkin, 108 Md. 470; 70 Atl. 238.

Goodman v. Kemp, 129 Md. 159; 98 Atl. 495.

Duering v. Brill, 127 Md. 104; 96 Atl. 269.

In *Tarbell v. Smith*, 125 Iowa 388; 101 N. W. 118, it was held that where a testator gave certain real estate to his wife for life, and after her death to go to my daughter * * * and at her death, if she has no heirs, then said estate, or so much of it as may be left, to be equally divided amongst my heirs, it must be presumed that the language which refers to the disposition of the property in the event of the daughter's death has reference to the contingency of her death before the death of the testator.

The clause of the will in question does not expressly or impliedly refer to Fenton's death without issue before that of his mother. Since the words used by the testator are unambiguous, it is impossible, without indulging in conjecture, to deduce from his words the meaning ascribed thereto by the appellees.

If the testator intended that the estate devised to his son by paragraph 6 of his will should be defeated if he survived the testator, but died in the lifetime of his mother and before reaching 25, one would naturally expect to find some such provision in the will. None appears. Therefore its absence would seem to indicate that the reference in

paragraph 8 was to his son's death in the lifetime of the testator and not that of his mother.

If the clause in question be construed to mean death at any time after that of the testator, since Fenton was only twelve years of age at the date of his father's death, it might very well result in the estate being tied up for a number of years pending the possible birth of issue to Fenton, with no provision made by way of trust, life estate, or otherwise, for the control and preservation of the estate in the meantime.

If, however, the clause be interpreted to mean death in the lifetime of the testator, then the fee simple estate previously given Fenton by the 6th paragraph of the will would not be defeated or reduced to a life estate merely.

In *Benson v. Corbin*, 145 N. Y. 351; 40 N. E. 11, it was said:

"I deem it a weighty consideration that a construction which follows the general rule making the death without issue relate to a death in the testator's lifetime harmonizes every word and every expression in the will, and renders them all consistent and operative, while the rival construction raises an inconsistency at once, only to be remedied by lessening to a practical life estate what naturally stands as a fee, or by discarding the inconsistent limitation as repugnant to the estate devised."

Provisions of the will should, if possible, be reconciled.

If there are two possible constructions of a particular provision of a will, one of which is in harmony with its other provisions, and the other in conflict with one or more provisions thereof, the court should adopt that construction which will harmonize and reconcile all of the provisions of the will, rather than ignore either or declare both void.

In 3 Page on Wills, Sec. 932, page 870 et seq., it is said:

It has already been said that it is a fundamental rule of construction that the court, in construing a will, will

endeavor to give effect to every part of the same. As a particular application of this rule, it follows that, within all reasonable limits, the court will endeavor to reconcile two apparently inconsistent provisions of a will rather than to absolutely ignore either, or to declare that they are both void or uncertain. * * * If the apparent effect of the latter provision is to *cut down the earlier gift*, such effect will not be given to the latter provision unless it is as clear and unambiguous as the original provision.

Evans v. Ockershausen, supra.

Comb v. Comb, 67 Md. 425, 428, 40 Atl. 268.

Another well recognized rule of construction is that, as between two reasonable constructions of a will, that which makes a gift absolute, rather than conditional will be preferred.

Page on Wills, Vol. 3, Sec. 1279, p. 745

Parmenter v. Pa. Co. for Insurance, 122 N. J. Eq. 25; 192 Atl. 62, affirmed 124 N. J. Eq. 272.

Boys v. Boys, 328 Ill. 47; 159 N. E. 217.

Applying these rules to the instant case, it would seem clear that the words "die without leaving lawful issue" refer to death of the devisee Fenton during the lifetime of the testator, otherwise this provision would be clearly inconsistent with and repugnant to the provisions of paragraph 6 devising to the son an alternative fee, thereby reducing the devise to Fenton to a conditional rather than an absolute estate. If the clause should be interpreted to mean die without issue at any time, it would likewise be inconsistent with the provision of paragraph 2 of the will whereby the residence property, if not disposed of by the wife, was given, not to testator's collateral relatives, but to *such of Fenton's children as he might direct by will*, and in default of such direction *to his heirs at law*. Thus, either *his children*, or *his heirs at law*, and not the collateral relatives of the testator, would take the residence. This provision,

if so construed, is also in conflict with the provisions of paragraph 4 of the will directing that upon Fenton reaching 25, or the death of his mother, the undisposed of real and personal property, other than the residence, "*shall be conveyed or given to him absolutely.*" In this connection it is significant that the will contains no express devise or bequest over to others in the event of the death of Fenton before reaching twenty-five years of age; nor does it provide that the estate so given to Fenton shall be defeated if he should die before reaching that age. Thus it would seem the testator intended that Fenton should take a vested remainder in fee, with possession or enjoyment postponed until he reached twenty-five. Again, the clause "die without leaving lawful issue" if so read, is repugnant to the provisions of paragraph 7 of the will whereby it is directed that if Fenton's mother shall die before he reaches 25, a trustee shall be appointed to hold the property until he arrives at that age, whereupon *the entire remaining estate shall pass to and become vested, not in testator's collateral relatives, but in Fenton absolutely.*

If, however, the words are read to mean death during the life of the testator, then the inconsistencies disappear and it becomes clear that the son having survived his father, took the fee. Thus, all of the provisions of the will are reconciled and are given full effect.

CONCLUSION.

It is respectfully submitted that the judgment of the court below was erroneous and should be reversed and judgment in favor of the appellants entered.

G. THOMAS DUNLOP,
C. F. R. OGILBY,
ARTHUR P. DEUBY,
JAMES SHERIER,
JOSEPH T. SHERIER,

Attorneys for Appellants.

APPENDIX

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IN THE
United States Court of Appeals

DISTRICT OF COLUMBIA.

No. 9404.

CENTRAL DISPENSARY AND EMERGENCY HOSPITAL, of the District of Columbia, a corporation, GARFIELD MEMORIAL HOSPITAL, of the District of Columbia, a corporation, PRESBYTERIAN HOME FOR THE AGED, of the District of Columbia, a corporation, THE WASHINGTON HOME FOR INCURABLES, of the District of Columbia, a corporation,
Appellants,

v.

MILDRED FRANCES SAUNDERS, WILLIAM R. RUSSELL, PERCY H. RUSSELL, JR., CONSTANCE A. RUSSELL, SPENCER S. RUSSELL, incompetent, FRANCES RUSSELL MYERS, NORMAN B. SAUNDERS, CLARION SPENCER SAUNDERS, UNKNOWN HEIRS, ALIENEES AND DEVISEES OF LORIN M. SAUNDERS, deceased, *Appellees.*

No. 9405.

NORMAN B. SAUNDERS, *Appellant,*

v.

MILDRED FRANCES SAUNDERS, WILLIAM R. RUSSELL, PERCY H. RUSSELL, JR., CONSTANCE A. RUSSELL, SPENCER S. RUSSELL, incompetent,

FRANCES RUSSELL MYERS, CLARION SPENCER SAUNDERS, UNKNOWN HEIRS, ALIENEES AND DEVISEES OF LORIN M. SAUNDERS, deceased, *Appellees*.

Appeals from the District Court of the United States for the District of Columbia.

JOINT APPENDIX.

1

Filed Dec. 16, 1942.

In the District Court of the United States for the District of Columbia

Civil Action No. 18095.

1. AMERICAN SECURITY AND TRUST COMPANY, a corporation, Executor and Trustee under the will of Julia I. Saunders, deceased, 15th Street and Pennsylvania Ave., N. W.,
2. DAISY M. OKERT, Executrix under the will of Julia I. Saunders, deceased, Wyoming Apartments, 2022 Columbia Road, N. W.,
3. CENTRAL DISPENSARY AND EMERGENCY HOSPITAL, of the District of Columbia, a corporation, 1711 New York Avenue, N. W.,
4. GARFIELD MEMORIAL HOSPITAL, of the District of Columbia, a corporation, 10th Street and Florida Ave., N. W.,
5. PRESBYTERIAN HOME FOR THE AGED, of the District of Columbia, a corporation, 1818 Newton Street, N. W.,

6. THE WASHINGTON HOME FOR INCURABLES, of the District of Columbia, a corporation, 3720, Upton Street, N. W.,
Plaintiffs,

v.

1. MILDRED FRANCES SAUNDERS, 1849 Irving Street, N. W.,
2. WILLIAM R. RUSSELL, 3100 University Terrace, N.W.,
3. PERCY H. RUSSELL, JR., 4448 Que Street, N. W.,
4. CONSTANCE A. RUSSELL, 3100 University Terrace, N. W.,
5. SPENCER S. RUSSELL, incompetent, St. Elizabeth's Hospital,
6. FRANCES RUSSELL MYERS, 3302 40th Avenue, Seattle, Washington,
7. NORMAN B. SAUNDERS, Mt. Vernon, New York,
8. CLARION SPENCER SAUNDERS, 215 Brock Avenue North, Montreal West, Canada,
2. 9. Unknown Heirs, Alienees and Devisees of Lorin M. Saunders, deceased, *Defendants.*

Complaint for Construction of Wills, for Declaratory Judgment and for Partition of Real Estate

1. *Jurisdiction.* This Court has jurisdiction under its general powers to construe wills of decedents, who where residents of the District of Columbia, affecting real estate in said District, (Title 11, D. C. Code), and to grant partition thereof, (Title 16, D. C. Code), and to enter declaratory judgments (Title 28, Section 400, United States Code, and Rule 57, Federal Rules of Civil Procedure).

2. *Plaintiffs.* American Security and Trust Company is a corporation created by and doing business under the laws in force in the District of Columbia, and brings this action as one of the duly qualified Executors of and as Trustee under the will of Julia I. Saunders, deceased. Daisy M. Okert

is a citizen of the United States, resident of the District of Columbia and brings this action as one of the Executors under the will of Julia I. Saunders, deceased. Central Dispensary and Emergency Hospital, of the District of Columbia, Garfield Memorial Hospital, of the District of Columbia, Presbyterian Home for the Aged, of the District of Columbia, and The Washington Home for Incurables, of the District of Columbia, are all corporations created by and doing business under the laws in force in the District of Columbia, and bring this action as residuary devisees under the will of Julia I. Saunders, deceased. For brevity, they are hereinafter called the "Residuary Devisees".

3. *Defendants.* Mildred Frances Saunders, William R. Russell, Percy H. Russell, Jr., Constance A. Russell and Spencer S. Russell are all residents of the District of Columbia, Frances Russell Myers is a resident of Seattle, Washington, Norman B. Saunders is a resident of Mt. Vernon, New York, and Clarion Spencer Saunders is a resident of Montreal, Canada. All of said defendants are citizens of the United States, except Clarion Spencer Saunders, who is a citizen of the Dominion of Canada, and all are sued as the alleged known, together with the alleged unknown heirs, alienees and devisees of Lorin M. Saunders, deceased. All of the named defendants are of full age and sui juris, except Spencer S. Russell, who was adjudged to be of unsound mind on or about June 6, 1940, in Insanity Cause No. 21,358, but plaintiffs are informed that no Committee has been appointed for his person or estate.

4. *Heirs of Lorin M. Saunders.*—Lorin M. Saunders, a citizen of the United States and resident of the District of Columbia, died on May 15, 1905, survived by his wife, Julia I. Saunders, and by one child, Fenton G. Saunders, who was, at the time of the death of Lorin M. Saunders, the sole heir at law of said Lorin M. Saunders. His widow, Julia I. Saunders, died on February 7, 1942, and at the time of her

death, plaintiffs are informed, the hereinafter described collateral relatives of Lorin M. Saunders survived. Lorin M. Saunders had two brothers, Darwin M. Saunders and Nelson T. Saunders, and one sister, Juliet Saunders Leach, all of whom survived Lorin M. Saunders, but predeceased Julia I. Saunders. Darwin M. Saunders had one son, defendant Clarion Spencer Saunders, who lives in Montreal, Canada, as above stated. Darwin M. Saunders also had two daughters, defendant Mildred Frances Saunders, who is now living, and Tuna Saunders Russell, who survived Lorin M. Saunders but predeceased Julia I. Saunders, leaving five children, defendants Frances Russell Myers,

4 William R. Russell, Percy Russell, Jr., Constance Russell and Spencer Russell, who are now living. Nelson T. Saunders had one child, defendant Norman B. Saunders, who is now living. Juliet Saunders Leach had four children, Emmet Leach, Darwin Leach, Mark Leach and Everett J. Leach, all of whom, plaintiffs are informed, survived Lorin M. Saunders, but predeceased Julia I. Saunders, and some of them left descendents in Oklahoma, Illinois and elsewhere, but plaintiffs, after causing inquiry to be made, have been unable to locate any of such descendents. Plaintiffs are informed, believe and therefore aver that the defendants named in the caption and the descendents of Juliet Saunders Leach are Lorin M. Saunders' nearest relatives surviving Julia I. Saunders.

5. *Will of Lorin M. Saunders.* Lorin M. Saunders, who died on May 15, 1905, as above stated, left a last will, dated February 25, 1905, which was duly admitted to probate in Administration Cause No. 12,942 in this Court. In and by his will, Lorin M. Saunders devised his residence at the northwest corner of Wyoming and Connecticut Avenues to his wife, Julia I. Saunders, for life, with a power of sale, which, plaintiffs are informed, was sold and conveyed to a purchaser by Julia I. Saunders during her lifetime and said residence is not, therefore, involved in this action. By said will, Lorin M. Saunders devised all of the rest, residue and

remainder of his estate, real and personal, to his said wife in trust with full power of sale and the discretionary right to apply and use the income and proceeds of sale for her support and maintenance and for the support and education of their son, Fenton G. Saunders, with directions, however, to convey certain of said property, in her discretion, to Fenton G. Saunders when he arrived at the age of 5 twenty-five years, said will further providing:

“And in case my said son shall die without leaving lawful issue, the whole of my estate, after the death of my wife, shall pass and decend to my heirs at law,”

as more fully set forth in the true copy of said will of Lorin M. Saunders hereto attached marked “Exhibit A” and made part hereof.

6. *Will of Fenton G. Saunders.* Fenton G. Saunders, a resident of the District of Columbia, was the only child of Lorin M. Saunders and therefore, the sole surviving heir at law of Lorin M. Saunders at the time of the latter’s death on May 15, 1905, as above stated. Said Fenton G. Saunders was born on April 24, 1892, and died on February 26, 1915, shortly before he attained the age of twenty-five years, leaving a last will, dated May 3, 1913, which was admitted to probate in Administration Cause No. 21,556, in this Court. By his said will, Fenton G. Saunders devised and bequeathed all of his real and personal property to his mother, Julia I. Saunders, “absolutely and without any reservation whatever”, as more fully set forth in the true copy of said will of Fenton G. Saunders hereto attached marked “Exhibit B” and made part hereof.

7. *Will of Julia I. Saunders.* Julia I. Saunders, a resident of the District of Columbia, died on February 7, 1942, leaving a last will dated November 7, 1927, and two codicils thereto dated May 18, 1932, and February 10, 1936, which were admitted to probate in Administration Cause No. 59,784 in this Court. In said will, plaintiffs, American Security and Trust Company and Daisy M. Okert, were named

as Executors and they have duly qualified in that capacity.

Said Trust Company was also named as Trustee of
6 two trust funds, one for \$70,000, increased by the codicils to \$100,000, to pay the net income to Daisy M. Okert for life, and one for \$20,000, decreased by the codicils to \$7,000, to pay the net income to Pauline Marshall for life. After providing for said trust funds and for the payment of several legacies of various sums, testatrix by her said will and codicils devised and bequeathed two-sevenths of her residuary estate to each of said plaintiffs, Central Dispensary and Emergency Hospital, Presbyterian Home for the Aged and Washington Home for Incurables, and the remaining one-seventh thereof to plaintiff, Garfield Memorial Hospital. Said will of Julia I. Saunders also provided:

“The property which I received from my late husband is to be distributed in accordance with the terms of his will.”

as more fully set forth in the true copies of said will and codicils of Julia I. Saunders hereto attached marked “Exhibits C, D and E” and made part hereof.

8. *Real Estate, which belonged to Lorin M. Saunders, assessed in name of Julia I. Saunders.* With the exceptions stated in Paragraph 10 hereof, all of the real estate listed on “Exhibit F”, hereinafter mentioned, which had belonged to Lorin M. Saunders, was assessed for taxation in the name of Julia I. Saunders at the time of her death on February 7, 1942, said real estate being described as follows:

Lot 56, Square 14,
Improved by premises
1132 25th Street, N. W.

assessed @

Land

\$2261

Improvements

3000

\$5,261

Lot 15, Square 526
Improved by premises
1034 3rd Street, N. W.

assessed @

Land

\$1032

Improvements

1000

2,032

Carried forward

\$7,293

7

Brought forward

\$7,293

Lot 32, Square 558
Improved by premises
217 K Street, N. W.

assessed @

Land

\$2035

Improvements

1300

3,335

All of Square East of 662
Unimproved (South Capital and
S Streets S. W.)

assessed @

Land

\$4553

4,553

Lot 47, Square 668
Improved by premises
1531 N. Capitol Street

assessed @

Land

\$1874

Improvements

1800

3,674

Lot 48, Square 668
Improved by premises
1533 N. Capitol Street,

assessed @

Land

\$2362

Improvements

2500

4,862

Lot 49, Square 668		
Improved by premises		
1 Florida Avenue N. E.		
assessed @		
Land	\$ 846	
Improvements	2500	
		3,346
Lot 50, Square 668		
Improved by premises		
3 Florida Avenue N. E.		
assessed @		
Land	\$ 951	
Improvements	1400	
		2,351
Lot 51, Square 668		
Improved by premises		
5 Florida Avenue N. E.		
assessed @		
Land	\$1102	
Improvements	1400	
		2,502
Lot 52, Square 668		
Improved by premises		
7 Florida Avenue N. E.		
assessed @		
Land	\$1033	
Improvements	1400	
		2,433
Lot 53, Square 668		
Improved by premises		
9 Florida Avenue N. E.		
assessed @		
Land	\$1159	
Improvements	1400	
		2,559
Carried forward		\$36,908

8 Brought forward

\$36,908

Lot 9, Square 1039

Improved by premises

1386 C Street S. E.

assessed @

Land

\$ 558

Improvements

2000

2,558

Lot 10, Square 1039

Improved by premises

1384 C Street S. E.

assessed @

Land

\$304

Improvements

500

804

Lot 11, Square 1039

Improved by premises

1382 C Street S. E.

assessed @

Land

\$260

Improvements

500

760

Lot 12, Square 1039

Improved by premises

1380 C Street S. E.

assessed @

Land

\$260

Improvements

500

760

Lot 13, Square 1039

Improved by premises

1378 C Street S. E.

assessed @

Land

\$260

Improvements

500

760

Lot 14, Square 1039
Improved by premises
1376 C Street S. E.

assessed @

Land	\$260	
Improvements	500	
		760

Lot 15, Square 1039
Improved by premises
1374 C Street S. E.

assessed @

Land	\$217	
Improvements	500	
		717

Lot 16, Square 1039
Improved by premises
1372 C Street S. E.

assessed @

Land	\$214	
Improvements	500	
		714

Total

\$44,741.00

9. *Schedule dated January 9, 1937.* Under date of January 9, 1937, Julia I. Sanders signed, without attesting witnesses, a "Schedule" stating that, pursuant to the powers conferred on her by her husband's will, she had used part of that estate for her support and maintenance and listing "all the property which remains out of that received by me from the Lorin M. Saunders Estate, which schedule is referred to in my Will of November 7, 1927," but the only reference in her will to such real estate is the phrase quoted in above Paragraph 7. A true copy of said Schedule is hereto attached marked "Exhibit F", and made part hereof.

10. *Conveyances by Julia I. Saunders.* Of the real estate listed on said "Schedule", Exhibit F, Lot 831, Square 557, was conveyed by Julia I. Saunders to the District of Columbia by deed dated November 16, 1937, recorded in Liber 7172, folio 254, of the Land Records, and Lots 17 to 22, inclusive, Square 2863, were conveyed by Julia I. Saunders to Daisy M. Okert by deed dated May 17, 1937, reciting a consideration of \$7,000, recorded May 18, 1937, in Liber 7110, folio 412, confirmed by deed dated July 30, 1937, recorded in Liber 7136, folio 143, of the Land Records. Lots 1, 3, 5 and 6, Square 1079, which formerly belonged to Lorin M. Saunders, but not mentioned on said "Schedule," Exhibit F, were conveyed by Julia I. Saunders to Daisy M. Okert by deed dated January 8, 1937, (the day before the date of said Schedule), reciting a consideration of \$5,000, and recorded January 9, 1937, in Liber 7067, folio 437, of the Land Records.

11. *Rents from real estate formerly belonging to Lorin M. Saunders.* Said "Schedule", Exhibit F, also contained the following statement:

"There are no mortgages, bonds, stocks or other securities remaining from the said estate. The only money remaining from said estate is that contained in the checking account in my name in The Columbia National Bank, which account consists of current rents, and income from the real properties listed above."

10 Plaintiffs are informed, believe and therefore aver that the balance to the credit of Julia I. Saunders in the Columbia National Bank at the time of her death, February 7, 1942, was \$966.28, of which part represented net rents collected from said real estate of Lorin M. Saunders which had not been sold by Julia I. Saunders during her lifetime. After the death of Julia I. Saunders, the Executors of her estate also received from P. J. Walsh, Inc., agents, the sum of \$176.53, representing "net rents" collected by said agents from said real estate prior to the

death of said Julia I. Saunders and since her death said agents have continued to collect such rents at the rate of about \$489.00 per month. The rents collected and accumulated since decedent's death, aggregating \$2,808.96 as of November 30, 1942, are being held by said agents to await the Court's decision in this action as to the ownership of said real estate.

12. *Plaintiffs' Claims.* Said "Residuary Devisees" under the will of Julia I. Saunders, who are plaintiffs herein, claim that said real estate, listed in above Paragraph 8, and said rents described in above Paragraph 11, constitute assets of the estate of Julia I. Saunders and were devised and bequeathed to said "Residuary Devisees" by her will, asserting that Julia I. Saunders had not just a life interest therein with power of sale, but a complete, absolute fee simple title thereto, or that under the will of Lorin M. Saunders, such assets, upon the death of his wife, were left to his sole heir at the time of his death, May 15, 1905, namely, his son, Fenton G. Saunders, under whose will they were devised and bequeathed to said Julia I. Saunders. (Plaintiffs are informed, believe and, therefore, aver that, aside from property which formerly belonged to Lorin M. Saunders, Julia I. Saunders owned at the time of her death real and personal property now estimated to be sufficient to pay all cash legacies bequeathed by her will, to establish said trust funds and to pay taxes and expenses of administration). The Executors and Trustee under her will, who are Plaintiffs herein, are unable to determine whether said claims of the "Residuary Devisees" are well founded and said Executors are unable to settle the Federal Estate Tax and District of Columbia Inheritance Tax until this Court decides whether said real estate and bank account constitute assets of the estate of Julia I. Saunders, deceased.

13. *Defendants' Claims.* Plaintiffs are informed, believe and therefore aver that Defendants, or some of them, claim that said real estate listed in above Paragraph 8, and the "net rents" described in above Paragraph 11, belong to

defendants as the "heirs" of Lorin M. Saunders at the time of the death of Julia I. Saunders on February 7, 1942; that the word "heirs" in the quotation from his will in above Paragraph 5, designates defendants, who were his surviving collateral relatives on February 7, 1942, and does not refer to his son, Fenton G. Saunders, who was living when the will of Lorin M. Saunders was executed and who was the sole "heir" of his father at the time of his father's death.

WHEREFORE, in consideration of the premises, of said conflicting claims and of the actual controversy which exists in regard thereto, plaintiffs demand judgment and pray:

1. That process issue against the defendants requiring them, and each of them, to answer this complaint;

2. That the usual notice by publication may be given to such of the defendants as may be non-residents of the District of Columbia, who do not voluntarily appear and
12 answer;

3. That a guardian *ad litem* be appointed to represent Spencer S. Russell, incompetent, in this action;

4. That the Court construe the wills of Lorin M. Saunders and Julia I. Saunders and determine who now has title to and owns the real estate described in above Paragraph 8 and the rents described in above Paragraph 11;

5. That if the Court decides that title to said real estate described in above Paragraph 8 is in said residuary devisees under the will of Julia I. Saunders, deceased, the Court decree partition thereof, or authorize said Executors (who are given power of sale by said will) to sell said real estate and divide the net proceeds of sale among said residuary devisees in the proportions stated in said will of Julia I. Saunders;

6. That if the Court decides that the rents described in above Paragraph 11 belong to the residuary legatees under the will of Julia I. Saunders, deceased, the Court direct the payment thereof to the Executors for distribution among said residuary legatees in the proportions stated in said will of Julia I. Saunders;

7. That allowances of reasonable counsel fees be made to counsel for plaintiffs out of such funds and in such manner as the Court may deem proper;

8. And for such other and further relief as the Court may deem proper.

•
• MCKENNEY, FLANNERY & CRAIGHILL

• By G. B. CRAIGHILL

*Attorneys for American Security
and Trust Company, Executor
and Trustee under the will of
Julia I. Saunders, deceased.*

Hibbs Building

PEELLE & NICHOLS

• By STANTON C. PEELLE, JR.

*Attorneys for Daisy M. Okert,
Executrix under the will of Julia
I. Saunders, deceased.*

Hibbs Building

13

MINOR, GATLEY & DRURY

By BENJAMIN G. MINOR

*Attorneys for Central Dispensary
and Emergency Hospital, of the
District of Columbia.*

Colorado Building.

G. THOMAS DUNLOP

*Attorney for Garfield Memorial
Hospital, of the District of
Columbia.*

Potomac Electric Power Com-
pany Building.

JAMES SHERIER

*Attorney for Presbyterian Home
for the Aged, of the District
of Columbia.*
Woodward Building.

PEELLE & NICHOLS

By STANTON C. PEELLE, JR.
*Attorneys for The Washington
Home for Incurables, of the
District of Columbia.*
Hibbs Building.

Exhibit A.

14

Filed Dec 16 1942

I, Lorin M. Saunders, of the District of Columbia, being of sound and disposed mind, but considering the uncertainty of this life, and desiring to settle my worldly affairs, do make, and declare this to be my last will and testament hereby revoking and annulling any and all other wills by me heretofore made.

It is my desire that my residence property, situated at the northwest corner of Whyoming and Connecticut Avenues, in the subdivision known as Washington Heights, in the District of Columbia, shall remain in the name of Saunders, as a home for my wife and son, as long as possible, and I therefore give, devise and bequeath the same with all the furnishings therein to my wife, Julia Isobelle Saunders, that she may keep the same as such home as long as she may live, hereby giving her, my said wife, full power and authority to sell and convey the same in fee simple on otherwise, at any time she may deem it expedient and proper so to do; And the purchaser or purchasers of said property shall not be required to see to the application of the purchase money.

And in case my said wife shall not sell or dispose of said property during her life, at her death it shall pass, and I bequeath the same, with all the furnishing, therein, to my son, Fenton Green Saunders, with full power in him to sell the same when he arrives at the age of twenty-five years, if his mother is then deceased. It being my intention to give my said son the same power of disposition of said property after his mother's death, as she, my wife shall have.

15 And in case the said property is not disposed of by either my wife or son, it shall pass at his death, to such of his children if any, as he may by will direct, and in case he shall not make such direction, it shall pass to such person or persons as would be his heirs at law.

And after the payments of my just debts, I give, devise and bequeath all the rest, residue and remainder of my es-

tate, both real and personal, of which I may die seized, to my wife, Julia Isobelle Saunders, in trust with full power to sell, mortgage, or convey the same in fee simple or otherwise, as in her judgment may be expedient, and the purchaser or purchasers thereof, shall not be required to see to the application of the purchase money. And the income or proceeds of the sale of such property shall be applied and used for her support and maintenance, and for the support and education of my said son, it being my desire that he shall be given a college education.

And when my said son shall arrive at the age of twenty-five years, I direct that such of the remainder of my property, real or personal, other than the residence property, then undisposed of and not used for, or necessary for the purposes of her maintenance or support aforesaid, shall be conveyed or given to him absolutely, if in the judgment of my said wife it is expedient so to do; but not otherwise. For if my said wife so desires, and shall deem it best for the welfare of our son, Fenton, she may keep the whole of said property for such time, after he arrives at the age of twenty-five and until she may deem it expedient to convey to him the real estate and give him the personal property then remaining, even though it be for her natural life.

It is my desire that my said wife shall have full power and authority to dispose of any or all of my property whether real or personal when she may deem it
16 for the best interest of my estate to do so.

And that she may use the income, or principal from my estate if necessary for the proper support and maintenance of herself and my son, the amount so expended or used being left to her descertion intending only, that such part or the remainder of my estate, existing at the death of my wife, if not conveyed or turned over to my son, by her, prior to her death, as herein provided, shall pass to him or his heirs absolutely,

And in case my wife shall die before our son, Fenton, reaches the age of twenty-five years, then I request that ap-

plication shall be made to the court for the appointment of some suitable person to carry out the trust herein, provided until he reaches such age, at which time and in that event all of my property then remaining shall pass to and become vested in my son absolutely.

And in case my said son shall die without leaving lawful issue, the whole of my estate, after the death of my wife, shall pass and decend to my heirs at law.

And lastely; I do hereby constitute and appoint my said wife, Julia Isobelle Saunders, trustee and sole executrix of this my last will and testament. And I appoint her guardian of our son also.

I request that my said trustee and executrix shall not be required to give any bond to qualify in either capacity, other than such bond as is required by law.

In testimony whereof I have herto set my hand this 25th day of February, 1905.

(Signed) L. M. SAUNDERS

16a Signed, published and declared by the above named testator, Lorin M. Saunders, as and for his last will and testament, in our presence, who at his request and in his presence have subscribed our names as witnesses thereto.

5-25-05 Leo Simmons 1321 Yale St. N W

5-25-05 Celia E. Brian, The Portner.

5-25-05 Howard Etchison 1321 Yale St. N.W.

Exhibit B

Filed Dec 16 1942

17 I, Fenton G. Saunders, being the son of Julia I. Saunders, and being above the age of twenty-one years, and of sound and disposing mind, do make this my last will and testament in manner and words following:

That is to say, I do give, devise and bequeath to my mother, Julia I. Saunders, all the real and personal prop-

erty which I may own and die seized of, to have and hold the same by her absolutely and without any reservations whatever.

And I hereby constitute and appoint my mother, Julia I. Saunders, the sole executrix of this my last will and testament, and request that she may not be required to give any bond other than that sufficient to guarantee the payment of my debts, if any.

IN TESTIMONY whereof I have hereunto set my hand this 3rd day of May 1913.

FENTON G. SAUNDERS.

Signed, sealed and declared by the above named testator, Fenton G. Saunders, as any and for his last will and testament, in our presence, who at his request, in his presence and in the presence of each other, have subscribed our names as witnesses thereto.

LEO SIMMONS
Kellogg Bldg. D. C.
BERKELEY L. SIMMONS
Kellogg Bldg.

Exhibit C

Filed Dec 16 1942

18 I, Julia I. Saunders of the District of Columbia being of sound mind and now in good bodily health, but considering the uncertainties of this life, do make and declare this to be my last will and testament, hereby revoking and annulling all other wills made by me.

First and principally:

I commit my body to the sod to be suitably buried by the side of my late husband, Lorin M. Saunders and near that of our dear son Fenton, in Oak Hill Cemetery, and trust my soul to the infinite mercy of my Heavenly Father.

And when such shall occur, I wish and direct that my estate of which I shall die seized and possessed, shall be disposed of as follows:

I direct my executor, hereinafter named, to pay all of my just debts and the expenses of my last illness and funeral in such amount as he may deem proper as soon after my death as may be practicable.

I give, devise and bequeath; *To* Berkeley L. Simmons who was a partner in business and a chum of my dear son Fenton the sum of seven thousand dollars (\$7,000.00)

19 *To* Edward Marle Bowling a friend of my dear son Fenton, if he shall survive me but not otherwise, I give and bequeath the sum of five thousand dollars (\$5,000.00).

To Albert V. Green the son of my deceased brother Albert, I give and bequeath the sum of three thousand, five hundred dollars (\$3,500.00).

To Lelia Green daughter of the same deceased brother Albert, I give and bequeath the sum of three thousand five hundred dollars (\$3,500.00).

To Harry Green son of the same deceased brother Albert I give and bequeath the sum of one thousand dollars (\$1,000.00).

To Clara Garner daughter of my deceased brother Edwin, I give and bequeath the sum of three thousand five hundred dollars (\$3,500.00).

To the sons of Victor the deceased son of my deceased brother Edwin, I give and bequeath the sum of three thousand five hundred dollars (\$3500.00) to be divided equally between such of them as may survive me, the issue, however, surviving at my death of any of them who may predecease me to take, *per stirpes*, the same part or share which the deceased ancestor would have taken if living.

20 *To* Mrs. Pauline Marshall the faithful friend and attendant of my family for more than twenty years, if she shall survive me, but not otherwise, I give and bequeath the sum of two thousand dollars (\$2,000.00).

J. I. S.

To Mrs. Daisy M. Okert whose care and attention as a trained nurse restored to me the full use of a badly fractured arm, if she shall survive me but not otherwise, I give and bequeath the sum of five thousand dollars (\$5,000.00).

To Mrs. Alice Pilling Bettis, if she shall survive me but not otherwise, I give and bequeath the sum of three thousand dollars (\$3,000.00).

To my god-son Berkeley Simmons and to my god-son Robert Fenton Simmons, both sons of Berkeley L. Simmons, I give and bequeath the sum of two hundred and fifty dollars each (\$250.00 each).

To Julia Solomons my friend from childhood I give and bequeath the sum of two thousand dollars (\$2,000.00).

To my friend and business adviser Leo Simmons I give and bequeath the sum of two thousand dollars (\$2,000.00).

*To James H. Campbell for faithful and devoted service to me and my family for many years, if he shall survive
21 me but not otherwise, I give and bequeath the sum of two thousand dollars (\$2,000.00).*

To Mrs. Nellie M. Simmons wife of Leo Simmons, I give and bequeath the sum of five hundred dollars (\$500.00).

To Katherine L. Simmons, wife of Berkeley L. Simmons, I give and bequeath the sum of three hundred dollars (\$300.00).

To Josephine Sharps for faithful service, if she shall survive me but not otherwise, I give and bequeath the sum of one hundred dollars (\$100.00).

To the Washington City Orphan Asylum I give and bequeath the sum of two thousand dollars (\$2,000.00), to be paid to the treasurer for the time being, for the use of said Asylum.

*To the Church of the Covenant at present located at Eighteenth and N Sts. in the City of Washington District of Co-
J. I. S.*

lumbia, I give and bequeath the sum of five hundred dollars (\$500.00).

To Daisy M. Okert, if she shall survive me but not otherwise, I give and bequeath absolutely all my furniture, china, pictures, silverware clothing, jewelry, and tangible personal property of every description of which I may die possessed wheresoever the same may be located at the time of my death. I direct that her receipt shall constitute a full discharge and acquittal of my executor in respect of the
 22 foregoing effects. I request but do not direct her to distribute to my friends such articles from these personal belongings as I have designated to her either verbally or in writing.

I hereby direct my executor (whom I shall name later) to place the sum of fifteen hundred dollars (\$1,500.00) in the keeping of the American Security and Trust Company of the District of Columbia for the following purpose: that is to say, to invest the same in U. S. Government bonds and if the condition should arise that no further burials or interments shall be allowed in Oak Hill Cemetery and the bodies there interred shall have to be removed, said Trust Company shall dispose of said bonds and under direction of my executor shall purchase a site of suitable size in some other cemetery, and cause the bodies of my husband, my son and myself, and those of my parents, my sister, and my brothers to be removed to such new site and all monuments and tombs shall be moved and placed at the heads of the bodies as they may be at the time of removal. If this should
 occur, whatever is left of such fund if any, shall
 23 revert to the residuary estate. Until the possible removal of these bodies in the circumstances set forth above, the income from these securities shall be applied to the care of the graves and after deducting necessary expenses, the remainder of this income shall be given each year by my executor, as a contribution to the Washington City Orphan Asylum.

J. I. S.

If Daisy M. Okert shall survive me but not otherwise, I give and bequeath the sum of seventy thousand dollars (\$70,000.00) unto the American Security and Trust Company, a corporation organized under the laws in force in the District of Columbia and having its principal office and place of business at the City of Washington, in said District, as trustee, *in trust*, to hold the same with full discretionary powers of management, of investment, sale and re-investment, and to keep the same invested, collect all revenue and income arising therefrom, and, after paying all such costs, charges and expenses as it may deem necessary or proper in the administration of this trust to pay over the net income arising therefrom unto the said Daisy M. Okert, for
 24 and during the term of her natural life. Upon her death, this trust shall finally cease and determine, and the entire trust fund then remaining in the hands of my trustee, together with any undistributed accumulations of net income thereon, shall be and become a part of the rest, residue and remainder of my estate and be disposed of as hereinafter provided therefor.

If Pauline Marshall shall survive me but not otherwise, I give and bequeath the sum of twenty thousand dollars (\$20,000.00) unto the said American Security and Trust Company, as trustee, *in trust*, to hold the same, with full discretionary powers of management, of investment, and sale and re-investment, and to keep the same invested, collect all revenue and income arising therefrom, and after paying all such costs, charges and expenses as it may deem necessary or proper in the administration of this trust, to pay over the net income arising therefrom unto the said Pauline Marshall for and during the term of her natural life. Upon her death this trust shall finally cease and determine, and the entire trust fund then remaining in the hands of my trustee, together with any undistributed accumulations of net income thereon, shall be and become a
 25 part of the rest, residue and remainder of my estate and be disposed of as hereinafter provided for.

J. I. S.

I hereby authorize and empower my executor and also my trustee, to vote in person or by proxy upon all stocks or other securities held by it, to exchange the securities of any corporation for other securities issued by the same, or by any other corporation, at such times and upon such terms and conditions as my executor or trustee shall deem proper, to consent to the reorganization, consolidation or merger of any corporation, or to the sale or lease of its property, or any portion thereof, to any person or corporation or to the lease by any person or corporation of his or its property or any portion thereof, to such corporation, and upon such reorganization, consolidation, merger, sale or lease to exchange the securities held by it for the securities issued in connection therewith; to pay all assessments, subscriptions and other sums of money as my said executor or trustee may deem expedient for the protection of its interests as

holder of any stocks, bonds or other securities of any
 26 corporation, and to exercise any option contained in any stocks, bonds or other securities for the conversion of the same into other securities, or take advantage of any rights to subscribe for additional stocks, bonds or other securities, and to make any and all necessary payments therefore, and generally to exercise in respect of all stocks, bonds or other investments held by my executor or trustee hereunder all such rights, powers and privileges as are or may be lawfully exercised by any person owning similar property in his own right, provided, however, that neither my executor nor my trustee shall be required to make any of the payments herein provided except from the principal of my estate or of the trust fund as the case may be.

If any of the individual beneficiaries hereinbefore mentioned in this will shall attempt to break it, or set aside any of the provisions of it, or of any codicil which I may make in the future they shall be barred from receiving any benefit from my estate, and the share which they would other-

J. I. S.

wise have received shall be forfeited and become a part of my residuary estate.

The property which I received from my late husband is to be distributed in accordance with the terms of his will.

27 All the residue, and remainder of my estate not otherwise disposed of, by and under the direction of this will, I direct my executor to convert into cash where necessary and distribute it in the following manner. It is to be divided into seven (7) equal parts.

To the Central Dispensary and Emergency Hospital of the District of Columbia, I give and bequeath two sevenths ($2/7$) of this residue to be used for the benefit of the Hospital.

To the Garfield Memorial Hospital of the District of Columbia I give and bequeath one seventh ($1/7$) of this residue to be used for the benefit of the Hospital.

To the Presbyterian Home for the Aged of the District of Columbia, I give and bequeath two sevenths ($2/7$) of this residue to be used for the benefit of its inmates.

To the Washington Home for Incurables of the District of Columbia, I give and bequeath two sevenths ($2/7$) of this residue to be used for the benefit of its inmates.

And lastly:

I hereby appoint and constitute Leo Simmons of
28 Washington District of Columbia, executor of my estate, vesting in him full power and authority to sell and convey any or all of my estate for the purpose of carrying out all directions and provisions of this will.

And the purchaser or purchasers shall not be required to see to the application of the purchase money.

If for any reason the said Leo Simmons should be unable to accept the appointment of executor to this my last will and testament, and should so signify, I hereby appoint the American Security and Trust Company of the City of Washington, District of Columbia a corporation previously
J. I. S.

described in this will, to succeed him as executor vesting in it full power and authority to sell and convey any or all of my estate for the purpose of carrying out the provisions and directions of this will. And the purchaser or purchasers shall not be required to see to the application of the purchase money.

No purchaser or purchasers from my trustee hereinbefore named shall be under any obligation to see to the application of the purchase money.

29 In witness whereof, I have hereunto set my hand and affixed my seal, this 7th day of November 1927.

JULIA I. SAUNDERS (Seal)

Signed, sealed, published and declared by the above-named testatrix, Julia I. Saunders, as and for her last will and testament, in our presence, and we, at her request, in her presence and in the presence of each other, have hereunto subscribed our names as attesting witnesses on the day and year last hereinbefore written:

3829 Garfield St. N. W., D. C.
1900 King St., Alex. Va.
1420 Taylor St. N. W. Wash. D. C.

F. R. Underwood
Kenneth C. Moore
Bruce S. Colton

30 Filed Dec. 16, 1942.

Exhibit D

CODICIL

to the Last Will and Testament of Julia I. Saunders.

I, Julia I. Saunders, of the City of Washington, District of Columbia, having in mind the present World wide depression and the condition of the real estate and securities

J. I. S.

JULIA I. SAUNDERS

markets and realizing the shrinkage in the market values of practically all of my properties and investments, do make publish and declare the following to be a Codicil to my last will and testatment, bearing date the 7th day of November, 1927, hereby revoking and annulling any Codicil to said will heretofore made by me.

Item One: In and by my Last Will and Testament aforesaid, I gave and bequeathed certain sums to persons therein designated, which sums I now increase as follows, namely:

I hereby increase the trust fund created for the benefit of Mrs. Daisy M. Okert from the sum of seventy thousand (\$70,000.00) Dollars to the sum of One Hundred Thousand (\$100,000.00) Dollars.

I hereby increase the money legacy bequeathed to the said Mrs. Daisy M. Okert from the sum of five thousand
31 sand (\$5,000.00) Dollars to the sum of twenty-five thousand (\$25,000.00) Dollars.

Item Two: In and by my last will and testament aforesaid, I gave and bequeathed certain sums to persons therein designated, which sums I now decrease as follows, namely:

I hereby reduce the trust fund created for the benefit of Mrs. Pauline Marshall from the sum of Twenty Thousand (\$20,000.00) Dollars, to the sum of Seven Thousand (\$7,000.00) Dollars.

I hereby reduce the legacy bequeathed to Berkeley L. Simmons from the sum of Seven Thousand (\$7,000.00) Dollars to the sum of three hundred (\$300.00) Dollars.

I hereby reduce the legacy bequeathed to Edward Earle Bowling from the sum of Five Thousand (\$5,000.00) Dollars to the sum of Fifteen hundred (\$1,500.00) Dollars.

I hereby reduce the legacy bequeathed to Mrs. Alice Pilling Bettis from the sum of three thousand (\$3,000.00) Dollars to the sum of Two hundred (\$200.00) Dollars.

I hereby reduce the legacy bequeathed to Julia Solomons from the sum of Two Thousand (\$2,000.00) Dollars to the sum of One Thousand (\$1,000.00) Dollars.

JULIA I. SAUNDERS

32 I hereby reduce the legacy bequeathed to Mrs. Pauline Marshall, from the sum of Two Thousand (\$2,000.00) Dollars to the sum of Five hundred (\$500.00) Dollars.

I hereby reduce the legacy bequeathed to James Campbell from the sum of Two thousand (\$2,000.00) Dollars to the sum of Five hundred (\$500.00) Dollars.

I hereby reduce the legacy bequeathed to the Washington City Orphan Asylum, from the sum of Two Thousand (\$2,000.00) Dollars to the sum of Five hundred (\$500.00) Dollars.

I hereby reduce the legacy bequeathed to the Church of the Covenant from the sum of Five hundred (\$500.00) Dollars to the sum of Two hundred (\$200.00) Dollars.

Item Three: In and by my last will and testament aforesaid I gave certain bequests to persons therein designated, which bequests I now revoke and annul as follows, namely:

I hereby revoke and annul absolutely, the bequest contained in my said Last Will and Testament of Mrs. Nellie M. Simmons, wife of Leo Simmons, in the sum of Five hundred (\$500.00) Dollars.

I hereby revoke and annul absolutely the bequest contained in my said Last Will and Testament to Leo Simmons in the sum of Two Thousand (\$2,000.00) Dollars.

33 *Item Four:* In and by my said Last Will and Testament I provided for and created two (2) trusts funds, one in the sum of Seventy Thousand (\$70,000.00) Dollars hereinbefore increased to One hundred thousand (\$100,000.00) Dollars for the benefit of Mrs. Daisy M. Okert, and the other in the sum of Twenty Thousand (\$20,000.00) Dollars hereinbefore reduced to Seven Thousand (\$7,000.00) Dollars for the benefit of Mrs. Pauline Marshall. As it is my will that these two (2) trust funds shall not be diminished because of a further shrinkage in the

JULIA I. SAUNDERS

value of my estate, I hereby direct that said trusts, one for One hundred thousand (\$100,000.00) Dollars and the other for Seven thousand (\$7,000.00) Dollars shall be preferred to and be given priority over all other bequests made in my aforesaid last will and testament and this codicil. Accordingly, I direct my executors, *Firstly*, to pay and establish said trust funds, totalling One hundred and seven thousand (\$107,000.00) Dollars and then, out of whatever may be left of my estate, to pay the costs of administration and all other bequests.

Item Five: I give and bequeath to Emily Stowe Mowatt, if she shall survive me but not otherwise, the sum
34 of six thousand seven hundred (\$6,700.00) Dollars.

I give and bequeath to Leo A. Walshe the sum of three hundred (\$300.00) Dollars.

Item Six: In and by my said Last Will and Testament I appointed and constituted Leo Simmons, to be the executor of my Last Will and testament, and in case of his inability to act as such executor, then, I appointed the American Security and Trust Company, of Washington, D. C., to act as alternate executor thereof. I hereby revoke that paragraph of my said Last Will and Testament, wherein I appointed the said Leo Simmons to be the Executor, and the said American Security and Trust Company to be the alternate Executor thereof, and substitute the following provisions therefor, with the same force and effect as though originally contained in my said last will and testament.

I hereby name, constitute and appoint Mrs. Daisy M. Okert and the American Security and Trust Company its successors and assigns, to be the Executors of my aforesaid Last Will and Testament. I request that No bond or undertaking be required of said Mrs. Daisy M. Okert,
35 co-executor as aforesaid in any jurisdiction wherein she might qualify.

JULIA I. SAUNDERS

If for any reason the said Mrs. Daisy M. Okert shall fail to undertake, or having undertaken shall fail to complete the discharge of her duties as co-executor hereof, then and in either of such events, the said American Security and Trust Company shall be the sole executor of this my Last Will and Testament.

Item seven: I hereby confer and impose upon the said Mrs. Daisy M. Okert and the American Security and Trust Company, as executors, all of the powers and duties conferred and imposed upon the said Leo Simmons, as executor, by the provisions contained in my said Last Will and Testament.

In all respects, except as hereinbefore expressly stated, I hereby ratify and confirm my last will and testament aforesaid.

In witness whereof, I have hereunto set my hand and affixed my seal this 18th day of May, A. D. 1932.

JULIA I. SAUNDERS (Seal)

36 Signed, sealed, published and declared by the above named testatrix, Julia I. Saunders, as and for a Codicil to her last will and testament, in our presence, and we, at her request, in her presence and in the presence of each other, have hereunto subscribed our names as attesting witnesses, on the day and year last hereunto before written.

Wm. Rea

F. R. Underwood

Wm. S. French, Jr.

171 V St. N. E. Wash. D. C.

3829 Garfield St. N. W. D. C.

4007 Conn. Ave. N. W. Wash. D. C.

JULIA I. SAUNDERS

Exhibit E

37

Filed Dec 16 1942

CODICIL

To the Last Will and Testament and Codicil of
Julia I. Saunders.

I, Julia I. Saunders of Washington District of Columbia, do make, publish and declare the following to be a codicil to my last will and testament, dated November 7th 1927 and to my codicil to said will dated May 18th, 1932.

Item I: In and by my said last will and testament, I bequeathed the sum of three (\$300.00) Dollars to Katherine Simmons and I now absolutely revoke and annul such bequest.

Item II: In and by my said last will and testament I bequeathed the sum of (\$250.00) two hundred and fifty Dollars to each of the two sons of Berkeley L. Simmons namely Berkeley Simmons and Robert Fenton Simmons, I now absolutely revoke and annul such bequests.

Item III: In and by my said codicil dated May 18th 1932, I bequeathed the sum of five hundred (\$500.00) Dollars to Mrs. Pauline Marshall, I now absolutely revoke and annul such bequest.

Item III: In and by my said codocil dated May
38 18th 1932, I bequeathed the sum of two hundred (\$200.00) to Mrs. Alice Pilling Bettis, I now absolutely revoke and annul such bequest.

Item V: In and by my said codicil, dated May 18th 1932, I bequeathed the sum of six thousand seven hundred (\$6,700.00) Dollars to Emily Stowe Mowat, I now decrease such bequest to the sum of two hundred (\$200.00) Dollars, and expressly provide that said sum of (\$200.00) shall become part of the residue of my estate in the event that said Emily Stowe Mowat should pre-decease me.

JULIA I. SAUNDERS

Item VI: In and by my last said codicil dated May 18th, 1932, I bequeathed the sum of one thousand (\$1,000.00) dollars to Julia Solomons, I now decrease such bequest to the sum of two hundred (\$200.00) dollars.

Item VII: In and by my said codicil dated May 18th, 1932, I bequeathed the sum of fifteen hundred (\$1500.00) dollars to Edward Earle Bowling, I now increase such bequest to twenty five hundred (\$2500.00) dollars.

39 Item VIII: In and by my said codicil dated May 18th, 1932, I bequeathed the sum of three hundred (\$300.00) Dollars to Leo A. Walshe, I now increase such bequest to the sum of twelve hundred (\$1,200.00) dollars.

Item IX: I give and bequeath to Bart Walshe son of P. J. Walshe, deceased, the sum of three hundred (\$300.00) dollars.

Item X: And finally I direct that if circumstances should arise such as set forth in my said last Will and Testament dated November 7th 1927, necessitating the removal of bodies from my lot in Oak Hill Cemetery I wish that the bodies of Mrs. Daisy M. Okert and her sister, if they have been interred there, to be placed in the same relative positions in the new lot, that they now occupy.

In all respects, except as hereinbefore expressly stated, I hereby ratify and confirm my said last Will and Testament, dated November 7th, 1927, and my said codicil dated May 18th, 1932.

In witness whereof I have hereunto set my hand and affixed my seal this 10th day of February A. D. 1936.

JULIA I. SAUNDERS (Seal)

40 Signed, sealed, published and declared by the above named testatrix, Julie I. Saunders as and for a codicil to her last will and testament, and codicil of May 18th, 1932, in our presence, and we, at her request, in her presence, and in the presence of one another, have hereunto

JULIA I. SAUNDERS

subscribed our names as attesting witnesses, this 10th day of February, A. D. 1936.

F. R. Underwood

K. C. Moore

W. A. Buscher

1515 N. Fillmore St. Clarendon Va.

4829 16th St., N. W., Wash. D. C.

3800 14th St. N. W. Wash. D. C.

Exhibit F

41

Filed Dec 16 1942

SCHEDULE OF L. M. SAUNDERS ESTATE PROPERTY AS OF JANUARY 9, 1937.

Pursuant to and in exercise of the powers conferred on me by the Last Will of Lorin M. Saunders, I have used a part of that estate for my support and maintenance during my lifetime. The following is the schedule as of January 9, 1937, of all the property which remains out of that received by me from the Lorin M. Saunders Estate, which schedule is referred to in my Will of November 7, 1927:

Square	14	Lot	56	Square	1039	Lot	10
"	526	"	15	"	1039	"	11
"	557	"	831	"	1039	"	12
"	558	"	32	"	1039	"	13
"	E. of 662—All of			"	1039	"	14
"	668	"	47	"	1039	"	15
"	668	"	48	"	1039	"	16
"	668	"	49	"	2863	"	17
"	668	"	50	"	2863	"	18
"	668	"	51	"	2863	"	19
"	668	"	52	"	2863	"	20
"	668	"	53	"	2863	"	21
"	1039	"	9	"	2863	"	22

JULIA I. SAUNDERS

There are no mortgages, bonds, stocks or other securities remaining from the said estate. The only money remaining from said estate is that contained in the checking account in my name in The Columbia National Bank, which account consists of current rents and income from the real properties listed above.

All deeds, title papers, and other papers pertaining to the above properties will be found in my safe deposit box in the Washington Loan and Trust Company.

/s/ JULIA I. SAUNDERS

Dated:

January 9, 1937.

* * * * *

44

Filed Feb 4 1943

**Answer of Mildred Frances Saunders and Clarion Spencer
Saunders to the Complaint**

1. These defendants admit that this Court has jurisdiction of this proceeding; that the defendant Mildred Frances Saunders is a citizen of the United States and a resident of the District of Columbia; that the defendant Clarion Spencer Saunders is a citizen of the Dominion of Canada, and a resident of Montreal, Canada; that both of these defendants are of full age and sui juris; that Lorin M. Saunders, a citizen of the United States and resident of the District of Columbia, died on or about May 15, 1905, survived by his wife, Julia I. Saunders, and by one child, Fenton G. Saunders; that said Fenton G. Saunders was born on or about April 24, 1892, and died on or about February 26, 1915; that said Julia I. Saunders died on or about February 7, 1942; and that among other relatives of said Lorin M. Saunders surviving her were and are these defendants, whose relationship to said Lorin M. Saunders is correctly stated in paragraph 4 of the complaint; that said Lorin M. Saunders left a last will which was duly admitted to pro-

bate in this Court by which he devised certain real and personal property to said Julia I. Saunders in trust with the provision that "in case my said son shall die without leaving lawful issue, the whole of my estate, after the death of my wife, shall pass and decend to my heirs at law"; and that said Julia I. Saunders left a last will which provided that "The property which I received from my late husband is to be distributed in accordance with the terms of his will"; and that these defendants claim not only that said real estate listed in paragraph 8 of the complaint and the net rents described in paragraph 11 of the complaint should be distributed to these defendants in accordance with the terms of the last will of said Lorin M. Saunders, 45 but also claim that any other properties found by this Court to be distributable to them or either of them in accordance with the terms of said will should be so distributed.

2. These defendants have no information as to whether or not the several parcels of real estate set out in the Complaint and in the exhibits attached thereto, and the several sums of money mentioned therein as rent from real property constitute all of the property received by said Julia I. Saunders from her husband, and the income therefrom, or whether there are other parcels of real estate and other sums of money, or mortgages, bonds, stocks, or securities, which were received by her either from her said husband or as the result of sales or exchanges of properties received from her husband, and which should be accounted for by the plaintiffs herein. These defendants, therefore, demand strict proof of all allegations of the Complaint not herein specifically admitted, and in particular demand a full and itemized report and accounting for the properties received by said Julia I. Saunders from her husband, the disbursements, collections, sales, and exchanges, if any, and the considerations received therefor, in order that this Court may determine what properties remained at the death of said

Julia I. Saunders in the trust created by the will of her husband or otherwise in her possession, or which have since her death come into the possession of the plaintiffs or any of them, and are subject to distribution to the defendants herein and each of them in accordance with the terms of his last will or her last will or both.

Wherefore, these defendants pray—

1. That the Court require the plaintiffs (and particularly the plaintiffs American Security and Trust Company and Daisy M. Okert) to file an itemized report and accounting of all properties received by said Julia I. Saunders from her said husband Lorin M. Saunders, together with all income therefrom and accretions thereto, all transfers, conveyances, sales, and exchanges, and the considerations received therefor, and all such properties remaining in her possession at the time of her death or which have come into the possession of said plaintiffs since her death.

2. That the Court award and decree to these defendants and each of them their just and lawful share of said properties and monies in accordance with the terms of said last will or wills.

3. That the Court grant to these defendants such other and further relief as may be proper.

ELIZABETH M. COX,

*Attorney for the Defendants
Mildred Frances Saunders and
Clarion Spencer Saunders.*

* * * * *

47

Filed Feb 4 1943

Answer of Defendants William R. Russell, Constance A. Russell and Percy H. Russell, Jr.

Defendants William R. Russell, 1731 K St., N. W. and Constance A. Russell, 3100 University Terrace, N. W. by their attorney, and Percy H. Russell, Jr., 914 Nat'l Press

Bldg. pro se, each for himself or herself, as the case may be, as and for his or her answer to the complaint herein:

1. Admits the averments contained in paragraphs 1, 2, 3, 5, 6, 7, 8, 9, 10, 11 and 13.

2. Admits all allegations contained in paragraph 4, except that each states that he or she is without knowledge or information sufficient to form a belief as to the fact that Juliet Saunders Leach had four children, Emmet Leach, Darwin Leach, Mark Leach and Everett J. Leach; that all of them survived Lorin M. Saunders, but predeceased Julia I. Saunders; that some of them left descendants in Oklahoma, Illinois and elsewhere.

3. Admits the allegations in paragraph 12, except that each defendant asserts that the claims of the "Residuary Devisees" are not valid claims.

Wherefore, defendants demand judgement and pray:

1. That the court construe the wills of Lorin M. Saunders and Julia I. Saunders and determine who now has the title to and owns the real estate described in paragraph 8 of the complaint and the rents described in paragraph 11 thereof.

48 2. That if the court decides that title to said real estate described in paragraph 8 of the complaint is in the defendants to this action, the court decree partition thereof or authorize the executors under the will of Julia I. Saunders (who are given power of sale by said will) to sell said real estate and divide the net proceedings of sale among said defendants in the proportions to which they are entitled as a matter of law.

3. That if the court decides that the rents described in paragraph 11 of the complaint belong to the defendants to this action, the court direct the payment thereof to the executors under the will of Julia I. Saunders, deceased, for distribution among said defendants in the proportions to which they are entitled as a matter of law.

4. And for such other and further relief as the court may deem proper.

WILLIAM R. RUSSELL

By PERCY H. RUSSELL, JR.

Percy H. Russell, Jr., Attorney
914 National Press Building
Washington, D. C.

CONSTANCE A. RUSSELL

By PERCY H. RUSSELL, JR.

Percy H. Russell, Jr., Attorney
914 National Press Building
Washington, D. C.

PERCY H. RUSSELL, JR.

PERCY H. RUSSELL, JR.

Percy H. Russell, Jr. Pro Se

* * * * *

49

Filed Mar 11 1943

Answer, Counterclaim, and Cross Complaint of Norman B. Saunders

ANSWER

The Answer of defendant Norman B. Saunders respectfully shows the Court:

1, 2, 3. This defendant admits the averments of fact of Paragraphs 1, 2, and 3 of the Complaint.

4. This defendant admits the averment of fact of Paragraph 4 of the Complaint, and further avers with respect thereto that this defendant is the only child and sole heir-at-law of Nelson T. Saunders, referred to in Paragraph 4 of the Complaint as the brother of Lorin M. Saunders, and this defendant claims in this proceeding not only in his own right but also as the sole successor to the rights of Nelson T. Saunders under the last will and testament of Lorin M. Saunders.

5. This defendant, without admitting the legal effect or construction of the will of Lorin M. Saunders to be as averred in Paragraph 5 of the Complaint, admits that he

duly executed a will of which Exhibit A to the Complaint is a true copy, and admits that the said Lorin M. Saunders died on, to wit, May 15, 1905. This defendant avers, however, that the power of sale of the property located
50 at the northwest corner of Connecticut and Wyoming Avenues, N. W., Washington, D. C. referred to in said Paragraph 5 of the Complaint did not vest the absolute ownership of the proceeds of such sale in Julia I. Saunders, but avers that the proceeds of the sale passed under the residuary provisions of the said will of Lorin M. Saunders.

6. This defendant, without admitting the legal effect or construction of the will of Fenton G. Saunders to be as averred in Paragraph 6 of the Complaint, admits that Exhibit B of the Complaint is a true copy thereof and admits that the said Fenton G. Saunders executed the same, and admits the respective dates of birth and death of the said Fenton G. Saunders are as averred in Paragraph 6 of the Complaint; and further avers that Fenton G. Saunders died unmarried and without issue.

7. This defendant, without admitting the legal effect or construction of the will and codicils of Julia I. Saunders to be as set forth in Paragraph 7 of the Complaint, admits that Exhibits C, D, and E are true copies thereof, admits the execution thereof, and that the death of said Julia I. Saunders is as averred in said Paragraph 7 of the Complaint.

8. This defendant is without information sufficient to admit or deny whether or not the property described in Paragraph 8 of the Complaint constituted all of the real estate belonging to Lorin M. Saunders, and, therefore, demands strict proof thereof.

9. This defendant is without sufficient information to admit or deny the averments of Paragraph 9 of the Complaint as to the execution of a schedule by Julia I. Saunders or of the contents thereof, and avers that said schedule, if in fact executed, was not an accounting by the said Julia I. Saunders of the property received by her from the said Lorin M. Saunders or an accounting of the income therefrom.

10. This defendant is without information sufficient to admit or deny the averments of Paragraph 10 of the
 51 Complaint, and calls for strict proof thereof, and prays for an accounting of the proceeds of conveyance of the property referred to, and prays for a discovery from the plaintiff Daisy M. Okert of the amounts actually paid by the said Daisy M. Okert for the various parcels of property conveyed to her and for a full disclosure of all consideration given by the said Daisy M. Okert therefor.

11. This defendant is without information sufficient to admit or deny the averments of Paragraph 11, but avers that all of the net rents not actually expended for the maintenance and support of Julia I. Saunders pass under the residuary provisions of the will of Lorin M. Saunders, and that this defendant is entitled to a pro-rata share thereof.

12. This defendant is advised that no answer is required to the averments of Paragraph 12 of the Complaint.

13. This defendant avers that the plaintiffs referred to as "residuary devisees" in the Complaint have no right to any of the real estate described in Paragraph 8 of the Complaint or any of the real estate owned by Lorin M. Saunders at the time of his death, or the proceeds of sale thereof or income therefrom, unless it was the intent of Lorin M. Saunders in directing in his will that

"And in case my said son shall die without leaving lawful issue the whole of my estate after the death of my wife, shall pass and descend to my heirs at law.",

to provide that if the said Fenton G. Saunders died without issue, thereby terminating his estate, the said Fenton G. Saunders should, nevertheless, take as his sole heir-at-law; and unless, further, the said Julia I. Saunders so construed the intent of Lorin M. Saunders, and, further, by her last will and testament intended to give and devise said property to the "residuary legatees". This defendant further avers that he is not limited in his claim to share in the proceeds of the estate solely to his right as one of Lorin M. Saunders' relations who survived Julia I. Saunders, but avers

52 that if, under any construction of the will of Lorin M. Saunders, Nelson T. Saunders, this defendant's father and the brother of the said Lorin M. Saunders, would have taken, this defendant by reason of being the sole heir-at-law and next-of-kin of the said Nelson T. Saunders is entitled to a prorata share. This defendant further avers that Julia I. Saunders was seized and possessed under the will of Lorin M. Saunders with no more than a life estate in the property of Lorin M. Saunders, with the right to use thereof so much as was necessary for her maintenance and support; and that the said Julia I. Saunders could not by testamentary disposition dispose of any of said property; and further avers that even if the said Julia I. Saunders had the right to dispose of any of said property it was not her intention by her will to give or devise any of the property which she had received by reason of the will of Lorin M. Saunders to the "residuary devisees" or any of them.

WHEREFORE, this defendant demands judgment decreeing him to be a tenant in common of the real estate referred to in the said Complaint, of the proceeds of sale thereof and of the income therefrom; and determining his interest therein to be an undivided one-third share thereof.

COUNTERCLAIM

The Counterclaim of the defendant Norman B. Saunders against the plaintiffs American Security & Trust Company and Daisy M. Okert, as executors of the last will and testament of Julia I. Saunders, respectfully shows the Court:

1. That under the terms of the last will and testament of Lorin M. Saunders referred to in the Complaint, Julia I. Saunders was given a trust estate of the property passing under the residuary clauses of the will of Lorin M. Saunders, the provisions of the trust being that she should use so much thereof and of the income therefrom as was necessary for her proper maintenance and support, and upon her death the said property was to pass to other persons, described as Lorin M. Saunders' "heirs at law." This de-

53 defendant incorporates in this Counterclaim the averments in his answers setting forth his relationship to Lorin M. Saunders and his claim to a share of the property and estate of Lorin M. Saunders both in his own right and as sole successor in title to Nelson T. Saunders, brother of the said Lorin M. Saunders.

2. This defendant avers that the said Julia I. Saunders has never rendered to him an accounting of the property received by her, or of the amounts expended by her for her maintenance and support. This defendant further avers that it is the duty of the plaintiffs American Security & Trust Company and Daisy M. Okert, as personal representatives of the said Julia I. Saunders, to render an accounting of the property received by Julia I. Saunders under the last will and testament of Lorin M. Saunders, as aforesaid, and of the monies expended by the said Julia I. Saunders for her maintenance and support.

WHEREFORE, this defendant prays:

1. That this Court enter an order against the plaintiffs American Security & Trust Company and Daisy M. Okert, as executors aforesaid, requiring them to account for the property and monies received by Julia I. Saunders as aforesaid, and of the amounts expended for the maintenance and support of the said Julia I. Saunders.

2. And for such other and further relief as the nature of the case may require and to the Court may seem meet and proper.

CROSS COMPLAINT

The Cross Complaint of the defendant Norman B. Saunders against the remaining defendants and each of them respectfully shows the Court:

1. That the property, except for cash, referred to in the Complaint consists of real estate and is not susceptible of division in kind.

54 2. That if this Court determines that the plaintiffs referred to in the Complaint as "residuary legatees" are not entitled to the property referred to in the Complaint, the defendants will be tenants in common

of the same. This defendant further avers that by reason of the matters and facts set forth in his Answer, which are incorporated herein by reference, this defendant is a tenant in common of said real estate with the remaining tenants.

3. This defendant avers that none of the real estate described in the Complaint can be divided without loss or injury to the parties interested, that is to say, to the defendants, and that this defendant as a tenant in common is entitled to a decree of partition thereof.

WHEREFORE, this defendant respectfully prays:

1. That this Court enter its judgment of partition of said real estate, and that this Court appoint a trustee to sell the said property and to make distribution of the proceeds of sale among the defendants in proportion to their respective interests in said real estate.

2. And for such other and further relief as the nature of the case may require and to the Court may seem meet and proper.

NORMAN B. SAUNDERS

By PAUL B. CROMELIN

FRANCIS C. BROOKE

Francis C. Brooke

Of Cromelin, Townsend,

Camalier & Kirkland

1366 National Press Building

Attorneys for Norman B. Saunders

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55

Filed Mar 27 1943

**Reply of Plaintiffs, American Security and Trust Company
and Daisy M. Okert, Executors and Trustee, to Counter-
claim of Defendant Norman B. Saunders**

1. These plaintiffs are advised by counsel that they are not required to answer the first sentence of Paragraph No. 1 of the counterclaim of Norman B. Saunders, but in regard thereto they refer to Exhibit A, attached to the complaint, setting forth the provisions of the will of Lorin M. Saunders, deceased. Further answering said Paragraph No. 1,

these plaintiffs admit that Norman B. Saunders is the son of Nelson T. Saunders, brother of Lorin M. Saunders, and, without admitting the validity of his claim, admit that he claims a share of the property and estate which belonged to Lorin M. Saunders.

2. In reply to Paragraph 2 of said Counterclaim, these plaintiffs are without knowledge or information sufficient to form a belief as to the truth of the averment that Julia I. Saunders never rendered an accounting to Norman B. Saunders and they deny that it is the duty of these plaintiffs to render an accounting to him.

McKENNEY, FLANNERY & CRAIGHILL

By G. B. CRAIGHILL

*Attorneys for American Security
and Trust Company, Executor
and Trustee.*

Hibbs Building

PEELLE & NICHOLS

By STANTON C. PEELLE, JR.

*Attorneys for Daisy M. Okert,
Executrix.*

Hibbs Building

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Filed Apr 6—1943

**Answer of Spencer S. Russell, Incompetent, by Guardian
Ad Litem**

The Answer of Spencer S. Russell, incompetent, by Percy H. Russell, Jr., his duly appointed guardian *ad litem*, to the complaint filed herein for construction of wills, for declaratory judgment, and for partition of real estate, respectfully represents to the Court as follows that:

1. The defendant, Spencer S. Russell, is an incompetent residing at St. Elizabeth's Hospital.

2. The defendant, Spencer S. Russell, is one of five children of Tuna Saunders Russell and has the same interest

in the above-entitled action as his four brothers and sisters, defendants herein. The interests of Spencer S. Russell are the same as all the other defendants in this action. One of the defendants, Norman B. Saunders, is actively participating in the proceedings in this cause, has employed counsel (Paul B. Cromelin and Francis C. Brooke), and has filed an Answer, Counterclaim, and Cross Complaint. Two other defendants, Mildred Frances Saunders and Clarion Spencer Saunders, are also actively participating as defendants herein, have employed counsel (Elizabeth M. Cox), and have filed an Answer.

59 3. In consequence of the incompetency of Spencer S. Russell, and since the defendant, Spencer S. Russell, can neither admit nor deny the allegations of complaint filed therein, he submits his interests to the protection of this honorable Court.

SPENCER S. RUSSELL
By PERCY H. RUSSELL, JR.
Guardian Ad Litem
914 National Press Building
Washington, D. C.

DISTRICT OF COLUMBIA: SS.

Percy H. Russell, Jr., being first duly sworn on oath, deposes and says that he is the duly appointed guardian ad litem for Spencer S. Russell, an incompetent and an heir at law of Lorin M. Saunders, deceased; that he has read the foregoing Answer and knows the contents thereof; that the matters and things stated therein of his own knowledge are true, and that those stated on information and belief he believes to be true.

PERCY H. RUSSELL, JR.
Percy H. Russell, Jr.

Subscribed and sworn to before me this 6th day of April, 1943.

MARY FRANKS,
Notary Public, D. C.

* * * * *

Filed Apr 19 1943

Answer of Defendant Frances Russell Myers

Defendant Frances Russell Myers, 3302 40th Avenue, W., Seattle, Washington, by her attorney, as and for her answer to the complaint herein:

1. Admits the averments contained in paragraphs 1, 2, 3, 5, 6, 7, 8, 9, 10, 11 and 13.

2. Admits all allegations contained in paragraph 4, except that she states that she is without knowledge or information sufficient to form a belief as to the fact that Juliet Saunders Leach had four children, Emmet Leach, Darwin Leach, Mark Leach and Everett J. Leach; that all of them survived Lorin M. Saunders, but predeceased Julia I. Saunders; that some of them left descendants in Oklahoma, Illinois and elsewhere..

3. Admits the allegations in paragraph 12, except that she asserts that the claims of the "Residuary Devisees" are not valid claims.

WHEREFORE, defendant demands judgment and prays:

1. That the court construe the wills of Lorin M. Saunders and Julia I. Saunders and determine who now has the title to and owns the real estate described in paragraph 8 of the complaint and the rents described in paragraph 11 thereof;

2. That if the court decides that title to said real estate described in paragraph 8 of the complaint is in the defendants to this action, the court decree partition thereof or authorize the executors under the will of Julia I. Saunders (who are given power of sale by said will) to sell said real estate and divide the net proceeds of sale among said defendants in the proportions to which they are entitled as a matter of law;

3. That if the court decides that the rents described in paragraph 11 of the complaint belong to the defendants to this action, the court direct the payment thereof to the executors under the will of Julia I. Saunders, deceased, for distribution among said defendants in the proportions to which they are entitled as a matter of law;

4. And for such other and further relief as the court may deem proper:

FRANCES RUSSELL MYERS

By PERCY H. RUSSELL, JR.

Percy H. Russell, Jr., Attorney
914 National Press Building
Washington, D. C.

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Filed Oct 4—1943

Default

It appearing from the sworn proofs of publication filed herein that the order of publication entered on January 7th, 1943, has been duly published in The Washington Law Reporter and Washington Post and that the defendants, Unknown Heirs, Alienees and Devisees of Lorin M. Saunders, deceased, have failed to cause their appearance to be entered herein as therein required and have failed to plead or otherwise defend this action.

It is this 4th day of October, 1943, declared that said defendants, Unknown Heirs, Alienees and Devisees of Lorin M. Saunders, deceased, are in default.

CHARLES E. STEWART, JR.

Clerk

By ELEANOR E. JOHE

Assistant Clerk.

Deputy Clerk.

63

Filed Feb 11 1944

Motion of Plaintiffs, American Security and Trust Company, Executor and Trustee Under the Will of Julia I. Saunders, Deceased, and Daisy M. Okert, Executrix Under Said Will, for a Summary and Declaratory Judgment

Plaintiffs, American Security and Trust Company, Executor and Trustee under the will of Julia I. Saunders, deceased, and Daisy M. Okert, Executrix under said will, move

the Court to enter a summary and declaratory judgment construing the wills of Lorin M. Saunders and Julia I. Saunders and determining who has title to and owns the real estate and rents described in Paragraphs 8 and 11 of the complaint.

As grounds for said motion, said plaintiffs say:

1. Upon all of the pleadings, there is no genuine issue as to any material fact relating to the foregoing *primary question*;

2. If the Court decides that the plaintiffs, who are residuary devisees under the will of Julia I. Saunders, are entitled to the property, it will be unnecessary to consider defendants' demand for an accounting and other relief;

3. If the Court decides that defendants, or some
64 of them, are entitled to the property, said plaintiffs move the Court to enter an order specifying what material facts exist without substantial controversy and what material facts are actually and in good faith controverted, and directing such further proceedings in the action as are just, in the manner provided by Rules 56 and 57 of the Federal Rules of Civil Procedure.

McKENNEY, FLANNERY & CRAIGHILL

By G. B. CRAIGHILL

Attorneys for Plaintiff,

*American Security and Trust
Company, Executor and Trustee
u/w Julia I. Saunders, deceased.
Hibbs Building.*

BAKER, SELBY & RAVENEL

By HENRY RAVENEL

Attorneys for Plaintiff,

*Daisy M. Okert, Executrix
u/w Julia I. Saunders, deceased.
American Security Building.*

* * * * *

Filed July 2, 1946

Consent Judgment Appointing Trustee and Order Making Allowance for Attorneys Fee

By consent of the parties, it is by the Court this 2nd day of July, 1946, adjudged, ordered and decreed as follows:

1. That the American Security and Trust Company, as executor and trustee of the will of Julia I. Saunders, and Daisy M. Okert, as executrix under said will, be and they hereby are allowed attorneys' fees in the sum of Twenty-five Hundred Dollars (\$2500.00), as payment in full for the services of their attorneys to date with respect to the issues raised by the pleadings herein, including their services in investigating the facts necessary for the bringing of this action, as well as their services rendered in said litigation; Eight Hundred Dollars (\$800.00) of which shall be a charge against the property adjudged by this Court to be the property of the defendants herein as the collateral heirs of Lorin M. Saunders, deceased, and the balance to be a charge against the assets of the estate of Julia I. Saunders, deceased, exclusive of the property herein adjudged to be the property of the collateral heirs of the said Lorin H. Saunders.

2. That the said plaintiff American Security and Trust Company, a corporation, be and it hereby is appointed Trustee herein to sell the real estate herein adjudged to be the property of the collateral heirs of Lorin M. Saunders, deceased, at public or private sale, with or without prior
66 notice and upon such terms as the said trustee shall deem to be the best interest of the said heirs of Lorin M. Saunders and without further order of this Court, provided, however, that the said Trustee shall promptly report each sale upon its completion; and in the event no appeal is taken, the said Trustee is hereby authorized to distribute among the collateral heirs of Lorin M. Saunders according to their respective shares the net proceeds of such sales as they occur, together with net rents heretofore or hereafter received, after withholding such sums as it in its discretion shall deem necessary and proper as a reserve for ex-

penses in carrying out the terms of this order, but in the event of any appeal by any party, the Trustee shall retain the proceeds of sales and rents, or such part thereof as may be necessary, until final disposition of the matter in controversy herein.

F. DICKINSON LETTS,
Justice.

Consented to:

McKENNEY, FLANNERY & CRAIGHILL

By G. B. CRAIGHILL

*Attorneys for American Security
and Trust Company, Executor and
Trustee under the will of Julia
I. Saunders, deceased.*

PEELLE & NICHOLS

By A. G. NICHOLS, JR.

*Attorneys for Daisy M. Okert,
Executrix under the will of
Julia I. Saunders, deceased.*

MINOR, GATLEY & DRURY

By.....

*Attorneys for Central Dispensary
and Emergency Hospital, of the
District of Columbia.*

JOSEPH T. SHERIER
of Counsel

G. THOMAS DUNLOP

*Attorney for Garfield Memorial
Hospital, of the District of
Columbia.*

JOSEPH T. SHERIER
of Counsel

JAMES SHERIER

*Attorney for Presbyterian Home
for the Aged, of the District
of Columbia.*

JOSEPH T. SHERIER
of Counsel

67 PEELLE & NICHOLS

By O. G. NICHOLS, JR.
*Attorneys for The Washington
 Home for Incurables, of the
 District of Columbia.*

CROMELIN, TOWNSEND, CAMALIER & KIRKLAND
 By FRANCIS C. BROOKE
Attorneys for Norman B. Saunders

PERCY H. RUSSELL, JR.
 Percy H. Russell, Jr., *Attorney for
 William R. Russell, Percy H. Russell, Jr.,
 Constance A. Russell, Frances Russell
 Myers, Guardian Ad Litem for Spencer S.
 Russell.*

ELIZABETH M. COX, *Attorney for Mildred
 Frances Saunders and Clarion Spencer
 Saunders.*

* * * * * * * *

68 Filed Jul 2 1946

Declaratory Judgment on Motion for Summary Judgment

This cause came on for hearing on the Complaint herein, the answers of the defendants Mildred Frances Saunders, William R. Russell, Percy H. Russell, Jr., Constance A. Russell, Frances Russell Myers, Norman B. Saunders and Clarion Spencer Saunders, the report of the guardian ad litem for Spencer S. Russell, incompetent, and the motion of the plaintiffs, American Security and Trust Company and Daisy M. Okert, as Executors and Trustee under the will of Julia I. Saunders, deceased, for a summary and declaratory judgment construing the wills of Lorin M. Saunders and Julia I. Saunders and determining who has title to and owns the real estate and rents described in Paragraphs 8 and 11 of the Complaint, and the Court being advised there is no substantial controversy as to the facts material to the determination of said motion (except as the

interpretation of the wills of Lorin M. Saunders and Julia I. Saunders may be a determination of fact), and that the averments of fact of the Complaint with respect to the issues upon which said motion may be determined are admitted to be true, the Court, after oral argument and consideration of briefs submitted by the various parties makes the following findings of fact and conclusions of law and enters the following judgment:

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Findings of Fact.

1. Lorin M. Saunders, a citizen of the United States and resident of the District of Columbia, died on May 15, 1905, survived by his wife, Julia I. Saunders, now deceased, and by one child, Fenton G. Saunders, now deceased, who was at the time of the death of Lorin M. Saunders the sole heir-at-law of the said Lorin M. Saunders. The said Julia I. Saunders died on February 7, 1942. The said Fenton G. Saunders was born on April 24, 1892, and died February 26, 1915, unmarried and without issue, leaving a last will, dated May 3, 1913, admitted to probate in this Court under Administration cause No. 21556 by the terms of which will the said Fenton G. Saunders devised and bequeathed all of his real and personal property unto his mother, the said Julia I. Saunders. The said Lorin M. Saunders was survived by two brothers, Darwin M. Saunders and Nelson T. Saunders, and by one sister, Juliet Saunders Leach, none of whom survived Julia I. Saunders. The said Darwin M. Saunders left surviving him one son, the defendant, Clarion Spencer Saunders, who is now living, and two daughters, one, the defendant, Mildred Frances Saunders, who is now living, and the other, Tuna Saunders Russell who survived Lorin M. Saunders, but predeceased Julia I. Saunders, and left five children surviving her and Julia I. Saunders, namely, the defendants, Frances Russell Myers, William R. Russell, Percy H. Russell, Jr., Constance Russell and Spencer Russell. The said Nelson T. Saunders left surviving him one child, the defendant Norman B. Saunders, who is now living. The said Juliet Saunders Leach had four chil-

dren, namely, Emmet Leach, Darwin Leach, Mark Leach and Everett J. Leach, all of whom survived Lorin M. Saunders, but the Court makes no finding as to whether any of the said children of Juliet Saunders Leach predeceased or survived Julia I. Saunders or whether any of said children of Juliet Saunders Leach left descendants surviving the said Julia I. Saunders.

2. The said Lorin M. Saunders left a last will and testament dated February 25, 1905, which was duly admitted to probate in Administration cause No. 12,942 in this
70 Court, and Exhibit "A" of the Complaint herein is a true copy of the said will. The said will of Lorin Saunders contained the following provisions:

"And after the payments of my just debts, I give, devise and bequeath all the rest, residue and remainder of my estate, both real and personal, of which I may die seized, to my wife, Julia Isobelle Saunders, in trust with full power to sell, mortgage, or convey the same in fee simple or otherwise, as in her judgment may be expedient, and the purchaser or purchasers thereof, shall not be required to see to the application of the purchase money. And the income or proceeds of the sale of such property shall be applied and used for her support and maintenance, and for the support and education of my said son, it being my desire that he shall be given a college education.

"And when my said son shall arrive at the age of twenty-five years, I direct that such of the remainder of my property, real or personal, other than the residence property, then undisposed of and not used for, or necessary for the purposes of her maintenance or support aforesaid, shall be conveyed or given to him absolutely, if in the judgment of my said wife it is expedient so to do; but not otherwise. For if my said wife so desires, and shall deem it best for the welfare of our son, Fenton, she may keep the whole of said property for such time, after he arrives at the age of twenty-five and until she may deem it expedient to convey to him the real estate and give him the personal property then remaining, even though it be for her natural life.

"It is my desire that my said wife shall have full power and authority to dispose of any or all of my property whether real or personal when she may deem it for the best interest of my estate to do so.

"And that she may use the income, or principal from my estate if necessary for the proper support and maintenance of herself and my son, the amount so expended or used being left to her descertion intending only, that such part or the remainder of my estate, existing at the death of my wife, if not conveyed or turned over to my son, by her, prior to her death, as herein provided, shall pass to him or his heirs absolutely.

"And in case my wife shall die before our son, Fenton, reaches the age of twenty-five years then I request that application shall be made to the court for the appointment of some suitable person to carry out the trust herein, provided until he reaches such age, at which time and in that event all of my property then remaining shall pass to and become vested in my son absolutely.

71 "And in case my said son shall die without leaving lawful issue, the whole of my estate, after the death of my wife, shall pass and descend to my heirs at law."

3. The said Julia I. Saunders left a will dated November 7, 1927, and codicils thereto dated May 18, 1932, and February 10, 1936, all admitted to probate in this Court in Administration cause No. 59,784. Exhibits C, D and E to the Complaint are true copies of said will and codicils. By the terms of said will and codicils the plaintiffs, American Security and Trust Company, is named as Executor and Trustee and the plaintiff, Daisy M. Okert is named as Executrix. After making bequests, legacies and devises not here in question, the said will makes the following direction:

"the property which I received from my late husband is to be distributed in accordance with the terms of his will" and disposes of the residue of the estate of Julia I. Saunders to the plaintiffs, Central Dispensary and Emergency Hospital of the District of Columbia, Garfield Memorial Hospital of the District of Columbia, Presbyterian Home for

the Aged of the District of Columbia, and the Washington Home for Incurables of the District of Columbia.

4. When the said Julia I. Saunders died there remained in her possession and control the real estate described in paragraph 8 of the complaint herein and prior to and after her death there have been collected and accumulated, as stated in paragraph 11 of the Complaint, certain rents from said real estate.

5. Lorin M. Saunders intended by the provisions of his will above quoted that if his only son, Fenton, died without issue before Fenton's mother, Julia I. Saunders, died, the remainder of the estate should go to the Collateral heirs of Lorin M. Saunders upon the death of the said Julia I. Saunders, the identity of such collateral heirs to be determined as of the date of death of the said Julia I. Saunders.

6. By reason of the Court's construction of the will of Lorin M. Saunders, and the Court's conclusion of law that Julia I. Saunders had no interest or estate in the property described by paragraphs 8 and 11 of the Complaint which could pass under her will, the Court makes no finding as to any intention of Julia I. Saunders as expressed in her will.

Conclusions of Law

1. The last will and testament of Lorin M. Saunders should be construed as providing that if his only son, Fenton, died without issue before Fenton's mother, Julia I. Saunders, died, the remainder of the estate of Lorin M. Saunders should go to the collateral heirs of Lorin M. Saunders upon the death of Julia I. Saunders, the identity of such collateral heirs to be determined as of the date of death of Julia I. Saunders.

2. Julia I. Saunders had no interest or estate in the property described in Paragraphs 8 and 11 of the Complaint which could be devised or bequeathed by her last will and testament.

3. The Court makes no conclusion of law as to the interpretation of the last will and testament of Julia I. Saunders, deceased.

Judgment

It is adjudged, ordered and decreed that the respective interests of the defendants in and to the property described in paragraphs 8 and 11 of the Complaint are as follows:

An equal share to each of the nephews and nieces of Lorin M. Saunders who survived Julia I. Saunders, and a like share to the issue collectively of any nephew or niece of Lorin M. Saunders who predeceased Julia I. Saunders leaving issue who survived Julia I. Saunders.

Among the nephews and nieces of Lorin M. Saunders who survived Julia I. Saunders, and are entitled to an equal share in said property, are the defendant, Norman B. Saunders, sole child of Nelson T. Saunders, deceased, and the defendants Clarion Spencer Saunders and Mildred Frances Saunders, son and daughter of Darwin M. Saunders, deceased.

73 Tuna Saunders Russell, daughter of Darwin M. Saunders, deceased, and a niece of Lorin M. Saunders, predeceased Julia I. Saunders leaving surviving her the following five sons and daughters, defendants herein, who survived Julia I. Saunders and are therefore entitled to take collectively the share that their mother would have taken if she had survived Julia I. Saunders, said share to be held by them in equal interests: Frances Russell Myers, William R. Russell, Percy H. Russell, Jr., Constance A. Russell, and Spencer Russell.

The Court does not at this time adjudge the interest, if any, of any descendant of Juliet Saunders Leach, it not being shown by the record now before this Court who, if any, of her descendants survived Julia I. Saunders.

F. DICKINSON LETTS,
Justice.

Dated: July 2, 1946.

* * * * *

Filed Jul 2 1946

Informal Memorandum

I have heretofore held that Lorin M. Saunders intended that if his only son, Fenton, died without issue before Fenton's mother, Julia I. Saunders, died, the remainder of the estate should go to the collateral heirs of Lorin M. Saunders upon the death of Julia I. Saunders, the identity of such collateral heirs to be determined as of the date of the death of Julia I. Saunders.

I now hold that the identity of the collateral heirs entitled to share in the distribution and the method of distribution should be determined by the law in force and effect at the time of the death of Julia I. Saunders, the life tenant. It follows that the surviving nephews and nieces of Lorin M. Saunders will take per capita and that the issue of nephews and niece of Lorin M. Saunders who predeceased Julia I. Saunders will take per stirpes the shares of their deceased parents.

Accordingly I have signed and filed of record the findings of fact, conclusions of law and the judgment form submitted by Elizabeth M. Cox, attorney for Mildred Francis Saunders and Clarion Spencer Saunders.

F. DICKINSON LETTS,
Justice.

BRIEF

IN THE
United States Court of Appeals
DISTRICT OF COLUMBIA

No. 9404

CENTRAL DISPENSARY AND EMERGENCY
HOSPITAL, OF THE DISTRICT OF
COLUMBIA, et al., *Appellants*,

v.

MILDRED FRANCES SAUNDERS, et al., *Appellees*.

No. 9405

NORMAN B. SAUNDERS, *Appellant*,

v.

MILDRED FRANCES SAUNDERS, et al., *Appellees*

Appeals from the District Court of the United States
for the District of Columbia.

BRIEF ON BEHALF OF NORMAN B. SAUNDERS,
ONE OF APPELLEES IN NO. 9404, AND SOLE
APPELLANT IN NO. 9405.

United States Court of Appeals
for the District of Columbia

FILED JAN - 4 1947

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I.

JURISDICTIONAL STATEMENT

Both appeals are from the judgment of the District Court (App. 57 in No. 9404) in an action brought by the American Security and Trust Company as executor and trustee under the will of Julia I. Saunders, Daisy M. Okert as executrix under the will of Julia I. Saunders, and the appellants in

No. 9404 for the construction of the wills of Julia I. Saunders and of Lorin M. Saunders. The District Court had jurisdiction under its general powers to construe wills of decedents who were residents of the District of Columbia, affecting real estate in said District (Title 11, District of Columbia Code) and to grant partition thereof (Title 16, District of Columbia Code) and to enter declaratory judgments (28 U.S.C. 400 and Rule 57, Federal Rules of Civil Procedure).

The judgment determined the interest of the parties to real estate originally belonging to Lorin M. Saunders and was a final judgment so far as the real estate included therein was concerned. This Court has jurisdiction on appeal from said judgment. Sec. 17-101 of the District of Columbia Code.

II.

STATEMENT OF THE CASE

Because two principal questions are presented by this brief, it being filed in both cases on appeal, a more complete description of the parties and issues is made than is contained in appellants' brief in No. 9404. Inasmuch as the case below was decided on a motion for summary judgment and no oral testimony was adduced, citations as to facts are made to the pleadings and exhibits in the joint appendix to the appellants' brief in No. 9404. The parties in No. 9405 have adopted the same joint appendix.

Lorin M. Saunders died May 15, 1905 the owner of the real estate described in the complaint below (App. 7-12). He left surviving him his wife, Julia I. Saunders, who died in 1942 (App. 4). The plaintiffs American Security & Trust Company and Daisy M. Okert below were joint executors of her will. He was also survived by one child, Fenton G. Saunders, who was at the time of the death of Lorin, Lorin's sole heir-at-law (App. 4). Fenton was born April 24, 1892 and died February 26, 1915, unmarried and without issue.

At the time of his death he lacked approximately four months of being 23 years of age. Fenton executed a will bearing date May 3, 1913, leaving his mother his sole devisee and legatee (App. 19).

Lorin Saunders also left surviving him two brothers and a sister, namely Darwin M. Saunders, Nelson T. Saunders and Julia S. Leach (App. 5). Had Fenton predeceased his father these persons would have been his sole heirs-at-law. Both brothers and the sister predeceased Julia I. Saunders. The brother Nelson left surviving him one son, Norman B. Saunders, on whose behalf this brief is filed (App. 5). The brother Darwin left surviving him one son, Clarion Spencer Saunders, and two daughters, Mildred Frances Saunders and Tuna S. Russell (App. 5). Clarion Saunders and Mildred Frances Saunders are appellees in both appeals. Darwin M. Saunders also had a daughter, Tuna S. Russell, who survived Lorin but predeceased Julia, leaving issue who are the appellees Francis Russell Myers, William R. Russell, Percy H. Russell, Jr., Constance Russell and Spencer Russell (App. 5). Lorin's sister, Julia S. Leach, had four children, Emmett Leach, Darwin Leach, Mark Leach and Everett J. Leach, all of whom survived Lorin but predeceased Julia. The identity of the issue of the four Leach nephews was unknown at the time of the filing of the complaint (App. 5) but is set forth in the motion of Fred G. Leach and others in this Court for leave to appear as parties appellees.

The appellants in 9404 are residuary beneficiaries under the will of Julia I. Saunders (App. 3-4, App. 26) and for convenience will be referred to herein as the "residuary legatees".

The pertinent provisions of Lorin's will are as follows:

"And after the payments of my just debts, I give, devise and bequeath all the rest, residue and remainder of my estate, both real and personal, of which I may die seized, to my wife, Julia Isobelle Saunders, in trust with full power to sell, mortgage, or convey the same in fee simple or otherwise, as in her judgment may be expe-

dient, and the purchaser or purchasers thereof, shall not be required to see to the application of the purchase money. And the income or proceeds of the sale of such property shall be applied and used for her support and maintenance, and for the support and education of my said son, it being my desire that he shall be given a college education.

“And when my said son shall arrive at the age of twenty-five years, I direct that such of the remainder of my property, real or personal, other than the residence property, then undisposed of and not used for, or necessary for the purpose of her maintenance or support aforesaid, shall be conveyed or given to him absolutely, if in the judgment of my said wife it is expedient so to do; but not otherwise. For if my said wife so desires, and shall deem it best for the welfare of our son, Fenton, she may keep the whole of said property for such time, after he arrives at the age of twenty-five and until she may deem it expedient to convey to him the real estate and give him the personal property then remaining, even though it be for her natural life.

“It is my desire that my said wife shall have full power and authority to dispose of any or all of my property whether real or personal when she may deem it for the best interest of my estate to do so.

“And that she may use the income, or principal from my estate if necessary for the proper support and maintenance of herself and my son, the amount so expended or used being left to her descertion (sic. discretion) intending only, that such part or the remainder of my estate, existing at the death of my wife, if not conveyed or turned over to my son, by her, prior to her death, as herein provided, shall pass to him or his heirs absolutely,

“And in case my wife shall die before our son, Fenton, reaches the age of twenty-five years, then I request that application shall be made to the court for the appointment of some suitable person to carry out the trust herein, provided until he reaches such age, at which time and in that event all of my property then remaining shall pass to and become vested in my son absolutely.

“And in case my said son shall die without leaving lawful issue, the whole of my estate, after the death of my wife, shall pass and descend to my heirs at law.

Julia Saunders' will contained the following provision (App. 26):

“The property which I received from my late husband is to be distributed in accordance with the terms of his will.”

Fenton Saunders having died unmarried and without issue and before attaining the age of twenty-five years (the earliest age at which he could receive any portion of the property other than for his support and education), the executors of Julia Saunders asked the District Court for the construction of the wills of both Lorin and Julia. The residuary legatees, who were also parties plaintiff in the complaint, claimed that the real estate passing under the residuary clause of Lorin's will was devised to them by the will of Julia, and asserted that Julia had not a mere life interest but a complete absolute fee simple title thereto, or that under Lorin's will the assets upon the death of Julia were left to his sole heir, Fenton, under whose will the properties were devised to Julia (App. 13). Thus were raised two questions, namely, whether Julia Saunders took more than a life estate, and, if she did, whether she intended such residue to go to the residuary legatees under her will.

So far as the appellees in No. 9404 were concerned and all of the parties in No. 9405, their interests as against the residuary legatees were identical, they having asserted, in various ways hereinafter more particularly enumerated, that Julia had no interest in the real estate which she could devise by a will, and even if she did, it was not her intention to dispose of it to the residuary legatees. To aid in an understanding of the issues, it is to be noted that if they were correct in either of these contentions, the judgment below must be affirmed so far as the residuary legatees are concerned.

It also should be noted that the residuary legatees are not quite correct when they say in their jurisdictional statement that “The American Security & Trust Company, being virtually a stakeholder, is not a party to this appeal.” It is true that neither executor under the will of Julia Saunders

appealed. It is not true, however, that they were virtually stakeholders. While they were stakeholders so far as the issues arising from the construction of Julia's will were concerned, they could not be stakeholders so far as the construction of Lorin's will was concerned because upon the construction of his will depended the determination whether Julia Saunders had any interest in the real estate which she could dispose of.

The complaint below in setting forth the "defendant's claims" (App. 13-14) asserted that the defendants contended that the word "heirs" in the crucial sentence from Lorin's will designated persons who would have been heirs at the date of Julia's death. Norman B. Saunders was the only relative of Lorin who refused to allow his contentions to be stated by his opponents as to the construction of Lorin's will. The answer of the appellees Mildred Frances Saunders and Clarion Spencer Saunders (App. 35-37) were essentially demurrers to the complaint so far as the construction of Lorin's will was concerned. The same is true of the answers of the appellees, William R. Russell, Constance Russell, Percy Russell, Jr. (App. 37-39). Norman Saunders, however, in paragraph 13 of his answer (App. 39, 41) gave detailed specifications as to why he claimed a share in Lorin's real estate. He averred that the residuary legatees had no right to any of the real estate unless it was the intention of Lorin to provide that if Fenton died without issue, thereby terminating Fenton's estate, Fenton should nevertheless take as his sole heir-at-law and unless, further, Julia Saunders so construed the intention of Lorin Saunders and by her last will intended to give the property to the residuary legatees. He further averred that he was not limited in his claim solely to his right as one of Lorin's relations who survived Julia, but that if under any construction of Lorin's will, Lorin's brother, Nelson, would have taken, Norman would have taken also by being the sole heir at law and next of kin of Nelson. It is apparent from the outset, Norman Saunders refused to be limited to

any question of time for determining "heirs" and refused to pitch his claim on the issue of the time of vesting.

A motion for summary judgment was duly filed by the executors of Julia's will (App. 48 and 49). The Court below after argument on the motion decided in favor of the appellees in No. 9404, holding that Lorin Saunders intended that if his only son died without issue before Julia, the remainder should go to Lorin's collateral heirs, the identity to be determined as of the date of the death of Julia.

The appellees in No. 9404 in presenting judgments carrying into effect the determination of the lower court fell into dispute as to the shares of the respective appellees, Norman Saunders claiming the division prescribed by the statutes in effect at Lorin's death providing for distribution *per stirpes*, and the remaining appellees claiming that distribution should be under the statute now in effect, enacted in 1935, under which they claim a distribution per capita the nephews and nieces of Lorin Saunders and *per stirpes* the issues of such nephews and nieces. The effect of the two statutes is that if the statute in effect at Lorin's death and at Fenton's death applied, Norman Saunders would be entitled to one-third of the property, inasmuch as he is the sole issue of one of Lorin's deceased brothers. Under the construction urged by the remaining appellees, who are also appellees in No. 9405, Norman would receive one-seventh, there being seven nephews and nieces who survived Lorin (one being Norman, Nelson's son, three being children of Lorin's brother Darwin, and four being the children of Juliet S. Leach). So far as the appellees are concerned, Clarion and Mildred Saunders would each receive one-ninth under the old statute, and one-seventh under their version of the present statute, the issue of Tuna S. Russell would collectively receive one-ninth under the old law as contrasted to one-seventh under their construction, and the issue of Juliet S. Leach's four children would receive collectively four-sevenths under their construction as contrasted to one-third under the old law.

The Court below filed an informal memorandum (App. 58) in which it held that the method of distribution should be determined by the law in effect at the time of the death of Julia I. Saunders, and construed that law in favor of the appellees in No. 9405. Consequently Norman Saunders noted an appeal although his interests were entirely different from those of the appellants in No. 9404.

III.

STATUTES INVOLVED

Code of law for the District of Columbia (1901), Sec. 955:

“Sec. 955. *Representation.* If in the descending or collateral line any father or mother shall be dead, leaving a child or children, such child or children shall, by representation, be considered in the same degree as the father or mother would have been if living, and shall have the same share of the estate as the father or mother if living would have been entitled to, and no more; and in such case, when there are more children than one, the share aforesaid shall be equally divided among such children.”

District of Columbia Code (1940), Sec. 18-105 (Act of March 6, 1935, 49 Stat. 40, Ch. 28, Sec. 5):

“18-105 (25:246). *Representation.* Whenever those entitled to share in the estate in fee simple in lands, tenements, or hereditaments in the District of Columbia, of an intestate, are all in the same degree of kindred to the intestate, they shall take per capita or by persons; and, where a part of them are dead and a part living, the issue of those dead shall take per stirpes or by stocks the shares of their deceased parents.”

District of Columbia Code (1940), Sec. 18-103:

“18-103 (25:244). *Heirs, other than children of intestate and their descendants, must be such at time of death of ancestor.* No right in the inheritance shall accrue to or vest in any person other than the children of the intestate and their descendants, unless such person is in being and capable in law to take as heir at the

time of the intestate's death; but any child or descendant of the intestate born after the death of the intestate shall have the same right of inheritance as if born before his death."

District of Columbia Code (1940), Sec. 45-812:

"45-812 (25:272). *Vested and contingent future estates.* A future estate is vested when there is a person in being who would have an immediate right to the possession of the land upon the expiration of the intermediate or precedent estate, or upon the arrival of a certain period or event when it is to commence in possession. It is contingent when the person to whom or the event upon which it is limited to take effect in possession or become a vested estate is uncertain."

District of Columbia Code (1901), Secs. 941 and 942, Repealed by the Act of March 6, 1935, (49 Stat. 39; Ch. 28, Sec. 3 (A) which is now Sec. 18-101 of the District of Columbia Code (1940):

"Sec. 941. *Estate descended from father.* If there be no child or descendant of a child, and the estate descended to the intestate on the part of the father, then to the brothers and sisters of the intestate, of the blood of the father, and their descendants equally.

"Sec. 942. If there be no brother or sister, as aforesaid, or descendant from a brother or sister, then to the grandfather on the part of the father; and if no such grandfather living, then to the descendants of such grandfather and their descendants in equal degree equally; and if no descendant of such grandfather, then to the father of such grandfather, and if none such living, then to the descendants of such father in equal degree; and so on, passing to the next lineal male paternal ancestor, and if none such, to his descendants in equal degree equally, without end."

IV.

STATEMENT OF POINTS

(For No. 9405)

The Court below erred in holding that Lorin Saunders intended that his property be divided according to the statutes of descent in force at the time of Julia's death rather than at the time of his own death or Fenton's death.

V.

SUMMARY OF ARGUMENT

The provision of the will on which rights of the contesting parties depend reads,

“And in case my said son shall die without leaving lawful issue, the whole of my estate, after the death of my wife, shall pass and descend to my heirs-at-law.”

If Lorin intended by the expression “my heirs at law” in the above provision the technical meaning given to it as a word of art, then none of his collateral relatives have any standing. On the other hand, if he did not employ that expression in its strict sense the residuary legatees under Julia's will have no standing, and these propositions are true whether the persons to take are to be ascertained as of the time of Lorin's death, the time of Fenton's death, or the time of Julia's death. The brief of the residuary legatees begs the question because it is based on the assumption without proving it, that Lorin used the expression “heirs at law” in its technical sense. The Courts in this jurisdiction as well as others have had no hesitancy in construing the term “heirs” in a different sense from its legal meaning when the context indicates that the testator did not intend the term in its legal sense and when to construe it in its legal sense would defeat the obvious intention of the testator.

The presumption of a technical meaning as to the word “heirs” is weakened when the draftsman is not an attorney

or scrivener; and it is obvious that the will in question was drafted by one not accurate in his use of words and unfamiliar with pertinent rules of law.

To construe the term "heirs" in its technical sense would defeat Lorin's obvious intentions expressed in the will. He gave to his wife the full use of his property during his life, including the right to sell any part of it necessary for her maintenance and support. He provided for Fenton's obtaining any interest in the property only when he attained the age of twenty-five and on the condition that he attained the age of twenty-five, and then only such property as was not necessary in Julia's discretion for her maintenance. He provided for his properties' going to Fenton's "heirs" or issue if Fenton predeceased Julia. He provided for the contingency of Julia's not living until Fenton attained the age of twenty-five. After providing for his wife and son and his son's "heirs" or issue, he provided for the contingency of Fenton's death without issue, a situation where after Lorin's wife's death Lorin had no descendants living. It is obvious that it was his intention that the property in that contingency (which eventually happened) should go to his own side of the house and not his wife's.

In construing the disputed clause, "And in case my said son shall die without leaving lawful issue", the Court below properly failed to add a qualification as to when Fenton should die without issue (i.e., during Lorin's lifetime) for the decisions in this jurisdiction clearly construe death without issue to mean death at any time without issue.

If Fenton's interest was vested Fenton's "heirs" would not include his mother but would be either his issue or Lorin's brothers and sister under the statutes in force at Lorin's death; and the argument of the residuary legatees based on Fenton's mother, Julia, being Fenton's heir is entirely erroneous.

Contemporaneous construction by Julia over a period of twenty-seven years precludes any claim by those claiming through her. Julia was the person having the greatest

interest in the construction of the disputed provision of the will and the person most likely to know the testator's intent. She also knew the terms of Fenton's will since she administered it. Despite all this knowledge and interest her actions are entirely inconsistent with any claim of interest in the remainder of the property in question but were consistent only with a recognition of the fact that Lorin intended by the term "heirs at law" his collateral relatives.

The judgment below violates a pertinent statute and determines adversely the rights of parties not before the Court. The statutes in effect at the time of Lorin's death, and still in effect, provide that one cannot inherit from an intestate unless he was in being at the time of the intestate's death or unless he were a descendant of the intestate. Lorin's brothers and sister are the only persons among his collaterals shown of record in this case to have been alive at his death; and it cannot be presumed that all of the Leach and Russell descendants were alive at that time. They can, therefore, claim only through those persons who were in being at his death and can claim collectively only the share those persons would have taken. Inasmuch as their claims are derivative, that is, based on the right of their ancestors, there is nothing of record to show that they succeeded to the rights of their ancestors as devisees or that their ancestors died intestate. The rights of persons claiming as devisees of Lorin's brothers and sister are not before the Court but the judgment below necessarily was adverse to them, and therefore cannot properly protect the trustee in distributing the property.

VI.

ARGUMENT

A. Lorin Saunders Did Not Use the Word "Heirs-at-Law" in Its Technical Legal Sense in the Portion of his Will in Question.

The crucial sentence of Lorin's will reads:

"And in case my said son shall die without leaving lawful issue the whole of my estate after the death of my wife, shall pass and descend to my heirs-at-law."

If the testator intended by his use of the expression "my heirs at law" the technical meaning given to it as a word of art, then the collateral relatives, including Norman B. Saunders, on whose behalf this brief is filed, have no standing. On the other hand, if he did not employ that expression in its strict sense, it is obvious that the residuary legatees under Julia's will have no standing.

These propositions are true, whether the persons to take are to be ascertained as of the time of Lorin's death, the time of Fenton's death, or the time of Julia's death. If the testator had expressly stated that his heirs were to be determined as of the time of Fenton's death or Julia's death, it would be perfectly obvious that he could not have used the word "heirs" in its technical sense as a word of art; because one has no heirs until his own death, and those heirs never change thereafter. When the Court below in its memorandum (App. 74) says that Lorin Saunders intended "... the identity of such collateral heirs to be determined as of the date of the death of Julia I. Saunders", the Court itself was not using the term "heirs" as a word of art or in its correct legal sense. If the testator used the word "heirs" in its technical legal sense, the time of vesting is unimportant because he had only one heir, namely, his son. Therefore the question of time of vesting is important, so far as the residuary legatees are concerned, only as one of several

means of determining whether the testator intended the word "heirs at law" in its technical meaning.

It is submitted that the entire brief of the residuary legatees begs the question at issue, because it is, practically in its entirety, based on the assumption that Lorin used the expression in its technical sense.

It is conceded, of course, that technical words will ordinarily be given their technical meaning unless the context of the will requires otherwise. This rule applies to the use of the word "heirs". However, the decisions which control in this jurisdiction plainly show that the courts have no hesitation in construing the term in a different sense from its legal meaning when the context indicates that the testator did not intend the word in its legal sense. Thus the Supreme Court of the United States has found no difficulty in determining what was meant by the word "heirs" of a living person, even though a living person has no heirs. *Barber v. Pittsburgh Railroad*, 166 U.S. 83, 108. This Court has held that a testator by the term meant heirs of the body, or issue. *Dengel v. Brown*, 1 App. D. C. 423. Where a testator gave personalty to his "heirs", this Court construed the word to mean next-of-kin. *Vogt v. Vogt*, 26 App. D. C. 46. In *Rutherford v. American Security and Trust Company*, 56 App. D. C. 214, 12 F. 2d 155, this Court held that the expression "heirs-at-law and next-of-kin" was to be so construed as to be restricted to those heirs-at-law and next-of-kin of the beneficiaries who were also lineal descendants of the testatrix.

The tests of construction when employed with reference to Lorin's will plainly show that he had in mind when he used the word "heirs", his collateral relations. These tests will be made the subject matter of separate headings hereinafter.

B. The Presumption of a Technical Meaning to the Term "Heirs" is Weakened When the Draftsman is Not an Attorney or Scrivener.

Had the will in question been the product of one skilled in legal terminology and in the drafting of wills, the presumption of a technical intent for a technical word is, of course, strong. On the other hand, the Court will judicially know that laymen use the term "heirs" in a much looser sense than the law gives to the term.

A perusal of the will demonstrates to a certainty that while Lorin made on the whole a very intelligent disposition of his property, he was not meticulous either in his draftsmanship or in his use of words. He misspelled "Wyoming", (App. 17) although he must have known the correct spelling since he lived on Wyoming Avenue. He spelled "discretion" "descertion" (App. 18). He spelled "lastly" "lastely" and "hereto", "herto" (App. 19). He used the term "bequeath" in disposing of his residence to his son (App. 17). With respect to this same residence he made a limitation over upon his son's death which was unquestionably void because the absolute power of disposition both by *inter vivos* conveyance and by will was given to the son, thereby giving him an unqualified fee. *Howard v. Carusi*, 109 U.S. 725. Elementary rules of grammar and punctuation are completely disregarded. There are paragraphs which are not even complete sentences.

C. To Construe the Word "Heirs" in Its Technical Sense Will Defeat the Testator's Obvious Intention.

No citation of authority is necessary for the proposition that the intent of the testator as gathered from the four corners of the will governs its construction. A sentence in a will must have had some purpose and must be given meaning in accordance with its intent. *Pyne v. Pyne*, — U.S. App. D.C. —, 154 F. 2d, 298, 299.

After disposing of his residence and its contents, Lorin directed his attention to the disposal of the residue. It is

at once apparent that the primary objects of his attention were his wife and his son. To his wife Julia he gave the property for life. She could sell all or any part of it that she in her discretion deemed necessary for the support of herself and Fenton (App. 18). Until Fenton arrived at twenty-five she could only give him what was proper for his maintenance and support, and after his attaining the age of twenty-five she was to give him only what was not necessary for her maintenance and support and only if in her judgment it was expedient so to do (App. 18). He gave to her all that could be given to her for her support and maintenance; but he plainly withheld from her the final disposition of the property after her needs were satisfied, for he directed (App. 18):

“that such part or the remainder of my estate existing at the death of my wife, if not conveyed or turned over to my son, by her, prior to her death, as herein provided, shall pass to him or his heirs absolutely.”

Plainly he intended that she could not disinherit Fenton or Fenton's “heirs”.

It is also obvious that whether Fenton took a vested or contingent interest, the *sine qua non* of his acquiring any of the property (other than for maintenance and support) was his attaining the age of twenty-five. Julia was authorized in her judgment to turn over the property to him when he reached that age, and in the event of her dying before that time the property was to be administered by a Court trustee for his maintenance, but the property was to go to him only on the condition that he attain that age and, if the testator's words have any meaning at all, he was not to have a vested interest until that time. The testator's intent in that connection is too plain to call for construction. He said (App. 18, 19):

“And in case my wife shall die before our son, Fenton, reaches the age of twenty-five years, then I request that application shall be made to the Court for the appointment of some suitable person to carry out the

trust herein, provided until he reaches such age, *at which time and in that event* all of my property then remaining shall pass to and *become vested* in my son absolutely." (Italics supplied.)

There remained one contingency, the death of the son without issue prior to his coming into enjoyment of the property and provision for that contingency was made immediately following the provisions for the contingency of Julia's death before Fenton attained twenty-five. This provision is the one which is now in dispute. The testator had theretofore in the will assured to his wife the entire property for her maintenance and support. He had provided for his son in case his son survived his wife. He provided for his son's "heirs" or issue in the event the son predeceased his wife. He had provided therefore for his wife and all of his descendants. He obviously in making the disputed provision was providing for the contingency of extinction of his own issue prior to his wife's death or at Fenton's death. It is obvious that his intent was that the property should not go to his wife's relatives but to his own relatives who survived him

Except for the fact that in Minnesota a widow is an heir, the case of *Anderson v. Brower*, 148 Minn. 44, 180 N. W. 1019, is as nearly identical a case as it is possible to find in questions of wills. In that case the testator gave to his wife the complete beneficial use of his property (after money legacies and the like) during her lifetime. His will further provided:

"I will and devise all the rest and residue of my estate to my son, Willie J. Anderson, to be paid to him when he reaches the age of thirty years, if my executors deem it advisable. Should my executors not deem it advisable to pay over to my adopted son, Willie J. Anderson, the residue of my estate on arriving at the age of thirty years, in that event, I direct that the portion to be paid to him when he reaches the age of thirty years, be paid to my legal heirs."

Willie Anderson failed to meet the condition set by the testator and the widow, who was the testator's legal heir, claimed the property. In denying her claim the Court said:

"Running through the will is seen the definite purpose of the testator to provide for Mrs. Anderson during life. A definite amount was assured her. He did not have in mind that she would ever have from his estate more than the allowance. If Willie became entitled to the residue he was to have it at thirty, but the whole estate was charged with the allowance to the widow for life. If Willie did not take it the testator's legal heirs were to have it. In our view, when he used the words "legal heirs" he meant his blood relatives and not Mrs. Anderson. The widow is, of course, the statutory heir of her deceased husband. The testator did something not at all unusual. Having no children, and expecting none, he first made provision for his wife for life. He gave the residue to his so-called adopted son, for whom he seems to have had great affection, but the gift was contingent upon his being worthy to have it in the judgment of the executors. The residuary gift failing, the testator preferred that it go to his blood relatives rather than directly or indirectly to his wife's relatives."

As was said in *McGinnis v. Campbell*, 274 Illinois 83, 113 N.E. 102:

"It is not contrary to law or public policy to devise an interest in the fee to one who has been given a life estate in the premises, and, where a devise is to the testator's heirs, it would *prima facie* include all heirs; but this technical construction of the word 'heirs' will give way to the intention of the testator if it appears from the language of the will that it was not intended to include all persons who would answer that description, but only a class of heirs."

In that case the phrase,

"To my legal heirs at the time of my decease, to be distributed to them according to the laws of descent of the state of Illinois"

was held not to include a widow who was an heir under the statutes of descent in Illinois.

To place the construction on the provision in question urged by the residuary legatees would defeat the obvious intention of the testator. Here, as in *Anderson v. Brower*, supra, Lorin had given to Julia by his will all that he intended her to have, and did not intend that those of her relatives who were not his issue should directly or indirectly benefit. He expressly made his son's enjoying or becoming vested with the property contingent upon his son's attaining the age of twenty-five, which age his son never attained. He intended that his son's issue should have the property if his son did not live to obtain it, and the provision in question disposed of the property in the contingency of his son's death without issue. To give the word "heirs" its technical meaning would be the equivalent of his having said that although his son should only have the property if he attained the age of twenty-five and although his son's "heirs" were to receive in lieu of the son in the event of his death before attaining the enjoyment of the property, nevertheless if the son were to die without issue, it was the testator's desire that the son should have the property absolutely. Such a conclusion would have been an absurdity and so to construe it would be doing violence to the rule that the sentence must have had some purpose and must be given meaning in accordance with its intent. See *Pyne v. Pyne*, — U.S. App. D.C. —, 154 F. 2d 297.

D. In Construing the Disputed Clause "And in Case My Said Son Shall Die Without Leaving Lawful Issue" The Court Below Properly Failed to Add a Qualification as to When Fenton Should Die Without Issue.

The first argument of the residuary legatees is predicated on a conclusion that when the testator used that language he meant Fenton's dying without issue during the testator's lifetime. In the same argument they urge that Fenton had a vested estate.

For authority for their proposition that the testator intended Fenton's death without issue to mean his death during the testator's lifetime, the residuary legatees cite plausible authority from various jurisdictions. If this question were one of first impression in this jurisdiction, these authorities would be worthy of analysis and refutation by similar authorities from still other jurisdictions. Howsoever, the phrase has been so construed by the Courts whose decisions govern in the District of Columbia, that it is unnecessary to go to other jurisdictions. Almost thirty years ago this Court refused to re-open the question of construction of the phrase "die without issue", reiterating that that phrase was not to be qualified by death at any particular time without issue. In *Herrell v. Herrell*, 47 App. D.C. 30, 32, this Court said:

"The first question presented is whether the words, 'die without issue', refer to death in the lifetime of the testatrix or at anytime. While it is true that similar words have been held to refer to death in the lifetime of the testator, where no contrary intention was manifest (*Stokes v. Weston*, 142 N.Y. 433, 37 N.E. 515; *King v. Frick*, 135 Pa. 575, 20 Am. St. Rep. 889, 19 Atl. 951; *Lawlor v. Holohan*, 70 Conn. 87, 38 Atl. 903; *Lumpkin v. Lumpkin*, 108 Md. 470, 25 L.R.A. (N.S.) 1063, 70 Atl. 238), we deem it unnecessary to consider those decisions, because the Supreme Court of the United States in *Britton v. Thornton*, 112 U.S. 526, 28 L. ed. 817, 5 Sup. Ct. Rep. 291, laid down the rule that, under a devise to one person in fee and in case he should die under age and without issue to another in fee, the devise over takes effect upon the death at any time of the first devisee under age and without children. The Court said: 'When, indeed, a devise is made to one person in fee, and "in case of his death" to another in fee, the absurdity of speaking of the one event which is sure to occur to all living, as uncertain and contingent, has led the Courts to interpret the devise over as referring only to death in the testator's lifetime. 2 *Jarman*, Wills, ch. 48; *Briggs v. Shaw*, 9 Allen, 516; Lord Cairns in *O'Mahoney v. Burdett*, L.R. 7 H.L. 388, 395, 31 L.T.N.S. 705, 23 Week, Rep. 361. But when the death

of the first taker is coupled with other circumstances which may or may not ever take place, as, for instance, death under age or without children, the devise over, unless controlled by other provisions of the will, takes effect, according to the ordinary and literal meaning of the words, upon death, under the circumstances indicated, at any time, whether before or after the death of the testator.' "

The decision in *Britton v. Thornton*, 112 U.S. 526, had been made long years before Lorin Saunders executed his will. If, as argued by the residuary legatees, it may be assumed that Lorin Saunders knew the law (Residuary Legatees Brief 7), it must likewise be assumed that he knew the legal interpretation of his language and that if he used the words "die without leaving lawful issue" without qualification as to when the death should occur, the condition or contingency would be given effect regardless of the time of Fenton's death without issue. Compare *Pyne v. Pyne*, — U.S. App. D.C. —, 154 F. 2d, 297.

E. In Providing that the Property Should go to Fenton or His "Heirs" on Julia's Death, Lorin Did Not Include Julia as Fenton's Heir.

It is obvious that Lorin's use of the word "heirs" in the phrase above quoted, and on which the residuary legatees depend, must be construed with reference to the contingency in the disputed provision of the will, namely, "In case my said son shall die without leaving lawful issue". Here again we have another illustration of the testator's looseness of expression. A meticulous scrivener would have used the same noun in both provisions instead of using the word "heirs" in one and "issue" in the other. It may well be argued that when he said the property "shall pass to him (i.e., Fenton) or his heirs absolutely", Lorin meant issue, for obviously even though Fenton died without issue he would not die without heirs.

Conceding for argument that Fenton's remainder was a vested one, the contention that Lorin used the word "or"

understandingly and designedly, as argued by the residuary legatees on Page 7 of their brief, defeats their construction of his will. When he provided that at Julia's death the remainder of the property undisposed of by her "shall pass to him (i.e., Fenton) or his heirs absolutely", he used the word "heirs" to designate who would take and not to designate the quantum. If, as contended by the residuary legatees, he used that word in its strict sense, he referred to Fenton's issue and to his own collateral relatives. The assumption on the part of the residuary legatees that Fenton's mother was his heir is false. They have completely overlooked the statutes of descent and distribution in force at the time of Lorin's death. Under Sec. 942 of the District of Columbia Code (1901), where the estate descended to the intestate from the father and there were no issue or brothers or sisters living, then the heirs would be the descendants of the intestate's grandfather on his father's side, in other words, Lorin's brothers and sister. This would of course entirely eliminate Fenton's mother as an heir.

If it be objected that the statute applied only to property acquired by descent, it is to be remembered that under the will Fenton would take the reversion after his mother's life interest, which is exactly what he would have taken had there been no disposal of the reversion in the will. Therefore, he would have acquired this reversion by descent and not by virtue of the will. As said in *Landic v. Simms*, 1 App. D.C. 507, 515:

"The making of the charge, or the carving out of a life estate, has nothing to do with the matter. The question is, whether, subject to the charge, or to the life estate, or such lesser or determinable estates as may have been carved out, the devise to the heir then gives him the same interest which he would have taken by descent. If it does, the devise is void, and the heir takes the interest, whatever it is, by descent."

F. A Construction of a Will Over a Twenty-seven Year Period by the Person Having the Greatest Interest, Which Construction is Against her Interest, Should Not be Ignored.

Julia Saunders, who presumably had better knowledge than anyone as to her husband's intention, never made the claims her residuary legatees assert. On the contrary her actions and her will plainly show that she understood that she had only a life interest. The Courts have held, and justice requires, that contemporaneous construction of long standing by the persons primarily interested, while not necessarily be controlling, should be given grave consideration. *Moore v. Moore*, 121 Ore. 48, 252 P. 964. See *Evans v. Ockerhausen*, 69 App. D.C. 285, 100 F. 2d 695. Julia also knew the terms of Fenton's will inasmuch as she administered it. If the contention of the residuary legatees is correct, under the rule of merger she became vested in possession with the fee simple of the property in question immediately upon her son's death. Fenton died in 1915. Mrs. Saunders did not die until 1942, more than twenty-seven years later. Yet during this time she gave effect to a construction of the will different from that contended by the residuary legatees.

Mrs. Saunders' will, written twelve years after Fenton's death, refers to "the property which I received from my late husband" (App. 26) and states that it is to be distributed under the terms of his will. If she construed her husband's will that Fenton's heirs and devisees would take even though he failed to reach the age of twenty-five and failed to survive her, the provision in question would be meaningless. We must, therefore, assume that by the provisions in her will she meant it in the sense in which it would be commonly understood, namely, that the physical property which in fact she did receive from her husband with full power of sale and disposition, was to be distributed in accordance with the terms of his will. Had she interpreted her husband's will as giving to her, through her son and by way

of merger, a fee simple estate the property in question, she would not have used the sentence in question. The provision in her will is primarily a factual statement. This is borne out by the schedule signed by her ten years after she executed her will and after she had executed both codicils (App. 34). She refers to "The property which remains out of that received by me from the *Lorin M. Saunders Estate*". From this schedule, it is manifest that she segregated the income received from that real estate from income received from other sources, and indicated the accounts in which the rents were deposited. Her will and schedule remained unchanged until the time of her death. Although she for twenty-seven years claimed only a life interest with a power of sale for the purpose of carrying out the trust under which she received the property, and made disposals by her will and codicils which could be realized from her own property received from others sources, the objects of her bounty are now the ones who thirty-seven years after her husband's death and twenty-seven years after her son's death, claim that she took and disposed of an additional interest *which, in her lifetime, she never claimed*.

G. The Time of Vesting of the Remainder is Immaterial to the Issues Between the Residuary Legatees and Lorin's Collateral Relatives, but If Material, Fenton's Remainder Was Contingent or at Least Subject to be Divested by his Death Under the Conditions Named in the Will.

It is conceded, of course, that the Courts favor an early vesting. However, the express provisions of the will providing for a divesting or keeping a future estate contingent must be given effect. *Costello v. Costello*, 80 U.S. App. D.C. 75, 149 F. 2d 379. *Pyne v. Pyne*, — U. S. App. D. C. —, 154 F. 2d 298.

Upon Lorin's death Fenton's interest was contingent, or at least plainly subject to be divested upon the happening or failure to happen of contingencies. He was to receive nothing, aside from maintenance and support, until he was

twenty-five. He was to receive then only such property as Julia in her discretion gave him. Thus there were two uncertainties respecting his interest. He might never reach twenty-five, and in fact he did not attain that age, but even if he did his estate was uncertain in amount because he could take only what his mother chose to give him or not consume for her own support. His interest was subject to the further contingency that if Julia died before Fenton attained the age of twenty-five, he should get the property when he reached such age; and his reaching that age not only fixed the time of delivery but the condition for delivery to him, for Lorin expressly stated, "At which time *and in that event* all of my property then remaining shall pass to and *become vested* in my son absolutely" (App. 19, italics supplied.) Still another contingency was Fenton's death with or without issue. When Fenton died prior to his attaining the age of twenty-five and without issue, whatever interest he had, whether vested or contingent, passed from him and there was nothing which he could convey by his will. Plainly at that time when the conditional limitation provided in Lorin's will had occurred, the course of ownership of the remainder changed.

Whether the interests of Lorin's collateral relatives vested then or at Julia's death is immaterial so far as the residuary legatees are concerned, for when under the provisions of Lorin's will the contingency which extinguished Fenton's interest transpired, it extinguished the interests of all claiming through him. The question as to when the interests became vested and the effect is discussed in the next succeeding topic heading.

H. To Hold That the Identity of the Collateral Relatives Was to be Determined at Julia's Death, and Further to Hold that Lorin Intended the Distribution to be in Accordance with the Statute at Julia's Death, is to Make an Unwarranted Inference Upon an Inference.

If, as has been heretofore demonstrated, when Lorin provided that in case Fenton "shall die without leaving lawful issue, the whole of my estate, after the death of my wife, shall pass and descend to my heirs at law", he meant his collateral relatives, it is obvious that he meant those who stood next in line under the statutes of descent to his son Fenton. Those persons who stood next in line were his brothers and his sister. Those persons were known and could be easily identified. Lorin merely said, "... the whole of my estate, after the death of my wife, shall pass and descend to my heirs at law". He did not say "My then heirs at law" or "my heirs at law living at Julia's death" or "my heirs at law to be determined as of the date of death of my wife." In that respect this case is clearly distinguishable from *Costello v. Costello*, supra. Nothing is said to indicate that vesting was to be deferred beyond the time of the express contingency of Fenton's death without issue or failure to attain the age of twenty-five. Therefore, there is nothing to take this part of the will out of the presumption that estates will be deemed to vest as soon as possible. There is no mention whatever as to the law under which the heirs should be determined. Therefore, to assume that the time of Julia's death determined the identity of the collateral heirs and the law under which they would take, inescapably results in an inference piled upon an inference, neither of which is justified by the context of the will.

I. The Judgment Below Violates a Pertinent Statute, and Determines Adversely the Rights of Parties Not Before the Court.

At the time Lorin made his will a statute was in effect which is still in force in this jurisdiction. This statute, Sec. 18-103 of the District of Columbia Code (1940), Sec. 953 of the Code of 1901, is as follows:

"18-103 (25:244). Heirs, other than children of intestate and their descendants, must be such at time of death of ancestor. No right in the inheritance shall accrue to or vest in any person other than the children of the intestate and their descendants, unless such person is in being and capable in law to take as heir at the time of the intestate's death; but any child or descendant of the intestate born after the death of the intestate shall have the same right of inheritance as if born before his death."

All of Lorin's brothers and his sister were living at his death. As to the remaining collateral relatives no showing has ever been made as to whether they were alive in 1905. Norman was in fact born prior to 1905. Which of the Leach descendants or the Russell descendants were alive has not been shown and it is certain that some of them were not yet born at the date of Lorin's death. The fact that such a situation might arise must have been obvious to Lorin, yet he said nothing which would qualify persons not unborn as his heirs.

Those persons not born in 1905 cannot claim as heirs of Lorin Saunders in the face of the statute above quoted. Their sole claim is derivative in nature. They can only claim through their ancestors who were living at Lorin's death. Thus to claim anything at all they must claim through persons who qualified as "heirs" before the amendment of Sec. 955 of the Code of 1901. See Sec. 18-105, District of Columbia Code (1940). This being so they can only claim collectively the share their ancestors would have taken, namely one-third to the descendants collectively of each surviving brother and sister.

As before stated, Norman has made a claim as the sole heir-at-law and next-of-kin of his father, Lorin's brother. Whether Lorin's other brother and sister left wills has not been shown. Certainly in the absence of such a showing it cannot be assumed that the persons now claiming were the devisees of their ancestors. To make the distribution in the manner ordered by the judgment below, cannot protect the trustees for the simple reason that the devisees of Lorin's brothers and sister have not been made parties and they have not had their day in Court as to their right to claim through them.

VII.

CONCLUSION

It is respectfully submitted, therefore, that the judgment below should be affirmed so far as it holds that Lorin's "collateral relatives" are entitled to the property, but reversed so far as it admits a distribution per capita Lorin's nephews and nieces, and the cause remanded for proceedings to establish the rights of the respective defendants below to claim through their ancestors.

Respectfully submitted,

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No. 9404

No. 9405

BRIEF OF APPELLEES
ALFRED E. LEACH AND MILDRED J. KAYSER

United States Court of Appeals

DISTRICT OF COLUMBIA

CENTRAL DISPENSARY AND EMERGENCY HOSPITAL, OF THE
DISTRICT OF COLUMBIA, ET AL.,
Appellants,

v.

MILDRED FRANCES SAUNDERS, ET AL.,
Appellees.

NORMAN B. SAUNDERS,
Appellant,

v.

MILDRED FRANCES SAUNDERS, ET AL.,
Appellees.

**Appeals from the District Court of the United States for
the District of Columbia**

*United States Court of Appeals
for the District of Columbia*

FILED APR 14 1947

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No. 9405

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v.

MILDRED FRANCES SAUNDERS, ET AL.,
Appellees.

Appeals from the District Court of the United States for
the District of Columbia

BRIEF IN BEHALF OF ALFRED E. LEACH AND
MILDRED J. KAYSER

I.

JURISDICTIONAL STATEMENT

Separate appeals are filed by Central Dispensary and Emergency Hospital, et al. and by Norman B. Saunders from the judgment of the District Court construing the will of Lorin M. Saunders, late of Washington, D. C. and determining the disposition of certain real estate constituting the remainder of a trust created by said will. The appellees, Alfred E. Leach and Mildred J. Kayser are collateral relatives of the decedent and are respectively a grand nephew and grand niece of the testator, being children of testator's deceased nephew, Mark Leach, a son of Juliet Saunders Leach, testator's sister. Both were living at the time of the testator's death. Neither was served with process in the District Court. They were made parties defendant therein as unknown heirs of Lorin M. Saunders, and without knowledge of their interest in the litigation, default was entered against them as "unknown heirs, alienees and devisees of Lorin M. Saunders".

By order of this court dated January 30, 1947 said Alfred E. Leach and Mildred J. Kayser were permitted to appear as parties appellees in the above causes.

II.

COUNTER STATEMENT OF THE CASE

Citations are to the pleadings and exhibits appearing in the joint appendix to appellants' brief in No. 9404 as to facts.

Lorin M. Saunders died May 15, 1905 leaving a will dated February 25, 1905. (App. 17-19) The pertinent provisions are stated below. The paragraphs are given numbers for convenient reference.

1. "It is my desire that my residence property, situated at the northwest corner of Wyoming and

Connecticut Avenues, in the subdivision known as Washington Heights, in the District of Columbia, shall remain in the name of Saunders, as a home for my wife and son, as long as possible, and I therefore give, devise and bequeath the same with all the furnishings therein to my wife, Julia Isobelle Saunders, that she may keep the same as such home as long as she may live, hereby giving her, my said wife, full power and authority to sell and convey the same in fee simple or otherwise, at any time she may deem it expedient and proper so to do; and the purchaser or purchasers of said property shall not be required to see to the application of the purchase money.

2. "And in case my said wife shall not sell or dispose of said property during her life, at her death it shall pass, and I bequeath the same, with all the furnishings therein, to my son, Fenton Green Saunders, with full power in him to sell the same when he arrives at the age of twenty-five years, if his mother is then deceased. It being my intention to give my said son the same power of disposition of said property after his mother's death, as she, my wife, shall have. And in case the said property is not disposed of by either my wife or son, it shall pass at his death, to such of his children, if any, as he may by will direct, and in case he shall not make such direction, it shall pass to such person or persons as would be his heirs at law.

3. "And after the payment of my just debts, I give devise and bequeath all the rest, residue and remainder of my estate, both real and personal, of which I may die seized, to my wife, Julia Isobelle Saunders, in trust with full power to sell, mortgage, or convey the same in fee simple or otherwise, as in her judgment may be expedient, and the purchaser or purchasers thereof shall not be required to see to the application of the purchase money. And the income or proceeds of the sale of such property shall be applied and used for her support and maintenance, and for the support and education of my said son, it being my desire that he shall be given a college education.

4. "And when my said son shall arrive at the age of twenty-five years, I direct such of the remainder of my property, real or personal, other than the residence property, then undisposed of and not used for, or necessary for the purposes of her maintenance or support aforesaid, shall be conveyed or given to him absolutely, if in the judgment of my said wife it is expedient so to do; but not otherwise. For if my said wife so desires, and shall deem it best for the welfare of our son, Fenton, she may keep the whole of said property for such time, after he arrives at the age of twenty-five and until she may deem it expedient to convey to him the real estate and give him the personal property then remaining, even though it be for her natural life.

5. "It is my desire that my said wife shall have full power and authority to dispose of any or all of my property whether real or personal when she may deem it for the best interest of my estate to do so.

6. "And that she may use the income, or principal from my estate if necessary for the proper support and maintenance of herself and my son, the amount so expended or used being left to her discretion intending only, that such part or the remainder of my estate, existing at the death of my wife, if not conveyed or turned over to my son, by her, prior to her death, as herein provided, shall pass to him or his heirs absolutely.

7. "And in case my wife shall die before our son, Fenton, reaches the age of twenty-five years, then I request that application shall be made to the court for the appointment of some suitable person to carry out the trust herein, provided until he reaches such age, at which time and in that event all of my property then remaining shall pass to and become vested in my son absolutely.

8. "And in case my said son shall die without leaving lawful issue, the whole of my estate, after the death of my wife, shall pass and descend to my heirs at law."

Testator's son Fenton, an only child, died February

26, 1915, at the age of 23, without issue, leaving a will naming his mother, Julia I. Saunders, sole beneficiary. (App. 19)

Testator's widow, Julia I. Saunders, died February 7, 1942 leaving a will (App. 20-34) by which she devised and bequeathed her residuary estate to certain charitable organizations who are the appellants in No. 9404.

The testator, Lorin M. Saunders, was survived by his widow Julia and son Fenton and by two brothers, Darwin M. Saunders, and Nelson T. Saunders, and by a sister, Juliet Saunders Leach. The two brothers and the sister predeceased the testator's widow. (App. 5)

Testator's brother, Darwin M. Saunders, had three children, two of whom, Mildred F. Saunders and Clarion Spencer Saunders, are living. The third child, Tuna Saunders Russell, predeceased the testator's widow, leaving five children, Frances R. Myers, William R. Russell, Percy H. Russell, Constance Russell and Spencer Russell, all of whom are living. (App. 5)

Testator's brother, Nelson T. Saunders, had one son, Norman B. Saunders (App. 5) who is the appellant in No. 9405.

Testator's sister, Juliet Saunders Leach, had four children who survived the testator, Lorin M. Saunders, but predeceased his widow. They were Emmet Leach, Darwin Leach, Mark Leach and Everett Leach. (App. 5)

The appellees, Alfred E. Leach and Mildred J. Kayser, are the only children of Mark Leach. They were both in being at the time of Lorin M. Saunders' death, as set forth in their petition for leave to appear as parties appellees herein.

Darwin Leach died without issue. Everett Leach died leaving a son, Fred G. Leach who is living and an appellee herein. Emmet Leach died, leaving eight children, all

born prior to the death of Lorin M. Saunders and appellees herein, and two grandchildren. Their names are set forth in their petition for leave to appear herein as appellees.

The foregoing include all the collateral relatives of Lorin M. Saunders, living at the time of the widow's death in 1942.

If the collateral relatives share in the remainder to the exclusion of the charitable organizations, as was held by the District Court, the remaining question at issue is whether they are to be determined as of the death of the testator or as of the death of the life tenant. To decide that question it is not necessary here to go into more detail as to their identity.

The appeal of the charitable organizations is based on the contention that under the language of Lorin M. Saunders' will his son Fenton had a vested remainder interest which he could dispose of by his will; that by his will, leaving everything to his mother, she acquired title to the real estate here involved which she in turn devised to the charitable organizations.

The appeal of Norman B. Saunders is based on the contention that while the District Court was correct in holding that Julia I. Saunders, the testator's widow, had no interest in the real estate in question and that the remainder should go to the collateral heirs of Lorin M. Saunders, it erred nevertheless in holding that such collateral heirs should be determined as of the date of death of the testator's widow.

The action was originally brought by American Security and Trust Company, one of the executors of and trustee under the will of Julia I. Saunders, for construction of the wills of Lorin M. Saunders and Julia I. Saunders and for a determination of who now has title to such real estate.

SUMMARY OF ARGUMENT

The question for the court to decide is who is entitled as between the charitable institutions and the collateral relatives, to the remainder in the trust created under the will of Lorin M. Saunders; and if the latter, in what proportions do such persons share.

The will of Lorin M. Saunders, dated February 25, 1905, disposes of his residuary estate by giving it in trust to his wife for her lifetime with power not only to use the income but to invade the principal for the support of herself and her son, Fenton, and with the further power in her sole discretion to convey the whole or any part of the trust fund to her son, Fenton, at any time after he had reached the age of twenty-five years. (App. 17-19) What the testator meant is explained in the paragraph of his will numbered 6 where he says "*intending only that such part or the remainder of my estate existing at the death of my wife, if not conveyed or turned over to my son prior to her death * * * shall pass to him or his heirs absolutely*".

For the contingency that his wife might die before Fenton reached the age of twenty-five years the testator provided in paragraph numbered 7 that in such case a suitable person should be appointed trustee in place of his wife to carry out the trust until Fenton became twenty-five years of age at which time all of the property then remaining in the trust "*shall pass to and become vested in my son absolutely*".

For the contingency that the son, Fenton, might die without leaving lawful issue the testator provided in the paragraph numbered 8 that in such event "*the whole of my estate, after the death of my wife, shall pass and descend to my heirs at law*". ,

Thus the wife could, if she so chose, pay over to Fenton the entire trust fund on his attaining the age of twenty-

five years or she could continue holding it in trust for her lifetime. Since Fenton died before reaching the age of twenty-five years nothing could have been conveyed by the trustee to him. The trust estate, except for what had been sold, therefore, remained intact till the death of the widow.

The contingency that happened was that Fenton died at the age of 23 years without issue (App. 6) survived only by his mother, the testator's widow and by cousins and their issue, some of whom are appellees herein.

It is clear that if Fenton had lived at the time of his mother's death in 1942 he then would have been entitled to the remainder. It is also clear under the paragraph of the will numbered 6 that if he had died before his mother leaving issue her surviving, then on her death such issue would have been entitled to the remainder of the trust regardless of whether Fenton had died before or after reaching the age of twenty-five. If on the other hand Fenton's mother had died before he reached the age of twenty-five, then under the paragraph numbered 7, the trust would have terminated on his attaining that age and the remainder would have vested in him at such time. Obviously the rights of Fenton or his issue were conditioned on his or their surviving his mother and also on his attaining the age of twenty-five years in case his mother died previous to that time. But he died without issue before his mother and before reaching twenty-five, that is, during the continuance of the trust and before any part of the remainder could be conveyed to him under the authority given to the trustee by the will and before any vesting under paragraph numbered 7.

The facts to be borne in mind in connection with the foregoing circumstances are that the testator died on May 15, 1905, three months after making his will (App. 5). His son, Fenton, was his only child. Fenton died February 26, 1915, leaving a will wherein his mother,

the testator's widow, is named sole beneficiary (App. 6). The widow died February 7, 1942, leaving her residuary estate to the appellant charitable institutions (App. 6).

Upon these facts and circumstances and under the language of the testator, what estate did the testator intend his son, Fenton G. Saunders, to have?

The charitable institutions claim (page 9 of their Brief) that since he survived his father, Fenton took a vested fee simple and that title to the property in controversy passed either to Fenton as the primary devisee, or to his mother under Fenton's Will (page 10 of their Brief). In other words, the contention is that under the will of his father, Fenton took a vested interest in the real estate in question so as to enable him to devise such real estate by his will.

The contention that the widow received a fee simple under her husband's will and not merely a life estate, has little force. But even if she did receive a fee whatever she received was disposed of by her will in accordance with the terms of Lorin M. Saunders' will (App. 26).

The District Court was correct in holding that Lorin M. Saunders intended that if his son, Fenton, died without issue before his widow the remainder should go to Lorin's collateral heirs, their identity to be determined as of the death of his widow, Julia I. Saunders.

ARGUMENT

Under the Will of Lorin M. Saunders, His Son Fenton Had only a Conditional Estate Liable to Be Terminated by His Death without Issue at Any Time Before the Death of the Life Tenant.

* * * * *

In the final analysis this controversy is determined by the interpretation of the clause numbered 8 of the will of the testator:

“And in case my said son shall die without leaving lawful issue, the whole of my estate, after the death of my wife, shall pass and descend to my heirs at law.”

Did the testator by the wording of this clause intend that his son should secure an absolute fee if he was fortunate enough to survive his father, or did he intend that even if his son Fenton survived him Fenton could still lose the property in case of his subsequent death before the termination of the trust without leaving any issue?

It is undoubtedly a general principle of law that ordinarily when a will speaks of the death of a devisee without issue it means death occurring during the life of the testator. But the rule applies only where the context of the will is silent, and affords no indication of intention other than that disclosed by words of absolute gift followed by a gift over in case of death without issue or other specified event.

In *Brown v. Gardner*, 233 N. Y. Court of Appeals 261, Mr. Justice Hiscock, Chief Justice of the Court of Appeals of the State of New York, in his opinion at page 265 emphasizes this very pointedly when he says:

“It has, however, been said that the foregoing interpretation in many cases rests more upon authority than upon logic and common sense and, therefore, the courts have adopted it as a modifying principle of construction that they will not hesitate to yield even to slight evidence found in the terms of the will in order to hold that such death without issue during the life of the testator was not the latter’s contemplation but that he meant death without issue occurring at any time either before or after his own decease. (*Vanderzee v. Slingerland*, 103 N. Y. 47, 53, 55.)”

Mr. Justice Hiscock in his opinion in *Brown v. Gardner*, 233 N. Y., *supra*, aptly states at page 264:

“The decisions covering this question are too numerous to be reviewed and even if they were reviewed we should not be able to reconcile them all or avoid

the conclusion that rules, and exceptions to and refinements of rules, have at times been adopted on the theory of carrying out the intention of a testator which undoubtedly have given him credit for intentions which he never entertained."

There is indeed more than slight evidence to be found in the language used by Lorin M. Saunders and in the surrounding circumstances tending to show that what the testator had in mind was the death of Fenton without issue at any time before the death of the life tenant.

Lorin M. Saunders made his will on February 25, 1905. He died less than three months thereafter. Fenton, at the time of his father's death was 13 years old. Fenton was an only child. Lorin M. Saunders' widow survived him by nearly 37 years. The circumstances here show a man making a will with elaborate provisions for the welfare of his wife and child, stressing certain benefits for the latter when he reached the age of twenty-five. From these circumstances it is quite apparent that the testator looked ahead twelve years when his son would be twenty-five, perhaps married and with a family when it would be desirable for him to have some money of his own and when he himself might no longer be alive. Therefore, when he spoke in paragraph numbered 8 of his will of the death of his son and only child, without issue, he would not be apt to think of the death of that son as occurring before his own.

It is to be noted what the testator said in paragraphs numbered 1 and 2 in dealing with the family residence. This residence is given outright to the widow and then to Fenton on the termination of the trust with power to appoint to his children and failing the exercise of the power of appointment the gift over is to his (Fenton's) heirs, and not to the testator's heirs, as in the case of the remainder. The testator wanted the residence for Fenton and his children *after the death* of the widow. This hardly

indicates any contemplation of Fenton's death in the testator's lifetime.

A further indication that the testator did not contemplate the death of his son before his own is found in paragraph numbered 7 of the will. Here he provided for the appointment of a successor trustee if the widow died before Fenton was twenty-five, and then expressly stated that when Fenton reached the age of twenty-five the remaining property should vest in him absolutely. It is the only place in his will where the testator speaks of any vesting. Such vesting was expressly postponed till Fenton reached the age of twenty-five years. It was intended to vest then even though in her discretion the widow and trustee could continue to hold as trustee for her lifetime.

Such provisions hardly convey the impression that the testator when he made the gift over in paragraph numbered 8 had in mind only the possibility of the death of his son before his own. They show, rather, a concern to cover all contingencies created by the death of his son, whenever that might be, either before his own death or after.

If, nevertheless, this court should find insufficient indication in the foregoing that the testator contemplated Fenton's death at any time before that of his widow, it cannot ignore the provisions of the paragraph numbered 6. By this paragraph the testator expressly states his intention to be that such part of the remainder existing at the death of his wife and not conveyed to Fenton prior to her death "shall pass to him or his heirs absolutely". This unequivocal expression of intention negatives not only the idea that the testator had in mind, exclusively, Fenton's death in his own lifetime but also negatives the contention that Fenton received a fee on the testator's death. The testator clearly indicates that he and no one else is disposing of the remainder and he gives it to Fenton or his heirs at the death of his widow. He had no thought

of allowing any one else to dispose of it. Fenton's heirs would be his issue, and not his mother. If he had no issue his heirs would be his uncles and aunt and their descendants, the testator's collateral relatives, the very persons who are appellees in both appeals, and the appellant in No. 9405.

The contention advanced by the charitable organization that Fenton received a fee which he could devise to his mother and which she in turn could devise to them is fantastic.

The District Court correctly concluded that Julia I. Saunders had no interest in any property belonging to the estate of her husband which could be devised or bequeathed by her last will and testament.

It remains only to be decided in what proportions the testator's collateral relatives should take.

The Will of Lorin M. Saunders and the Surrounding Circumstances Offer Clear Indications of the Testator's Intent that the Date of Death of the Widow Shall Determine the Persons Who Are to Be His Heirs.

* * * * *

The atmosphere of futurity which permeates this entire will is unmistakable.

The testator's son, Fenton, was thirteen years old the year the will was executed, which was also the year of the testator's death. The vesting of the trust estate was definitely postponed for twelve years at least. If the widow died before Fenton reached the age of twenty-five, then when Fenton reached such age

“* * * all of my property then remaining shall pass to and become vested in my son absolutely.” (paragraph numbered 7)

If the widow died after Fenton had reached twenty-five

“* * * such part of the remainder of my estate existing at the death of my wife * * * shall pass to him or his heirs absolutely”. (paragraph numbered 6)

If Fenton died before the widow without issue

“* * * the whole of my estate, after the death of my wife, shall pass and descend to my heirs at law.” (paragraph numbered 8)

There was to be no vesting until either Fenton had attained the age of twenty-five and the widow had previously died, or until the death of the widow.

In each of the above quoted passages similar language is used. The property “shall pass” or “shall pass and descend” or “shall pass to and vest in”, at a specified future time, namely, “at the death of my wife” or “after the death of my wife”, except of course in the eventuality of her death before Fenton’s in which case the vesting was to be in Fenton on his reaching the age of twenty-five. The “passing” in each case is prospective. The passing, to Fenton if he survived the widow, or to the testator’s heirs, was to be only after the death of the widow. Only then should the remainder pass to the testator’s heirs, and then only on condition that Fenton was dead and had no issue surviving at the widow’s death. The gift over to the testator’s heirs was to be effective only when the contingency arose. Consequently it was a gift to the class of heirs as of the effective date.

The testator was evidently interested primarily in providing for his wife in a certain definite manner down to the moment of her death. If his son then were alive he would be taken care of. After her death, if his son were no longer living and had no children, he apparently had no desire to limit the succession of his real estate to any particular definite line of persons. Consequently he directed generally that it should go to his heirs at law, that is, to the

persons whom the law should designate as his heirs when the time arrived.

The general rule of law respecting the time when, in the case of a gift to a class, such class is to be determined, is well established. Likewise is the exception thereto, namely, that it yields to indications of an intention to the contrary. Citation of authority therefore is not much to the point, as each state of facts rests very largely on its own merits.

However, it is interesting to observe how various courts have been impressed by certain language. In *Costello v. Costello*, 80 U. S. App. D. C. 75, for instance, the court in its opinion italicized the words "after the death of my brother—I give and devise", found in the will, and held that the heirs were to be ascertained as of the brother's death and not as of the testator's death. In *Genung v. Best*, 100 N. J. Eq. 250, the use of the word "shall" was held as an indication of the testator's intent to give to such persons as answered the description of heirs at the life tenant's death rather than at the testator's. In *Gilliam v. Guaranty Trust Co.*, 186 N. Y. 127, the court said at p. 133 of its opinion:

"The general rule applicable to the facts here presented is well established that when property at a future date is to pass to a certain class of persons, it will be distributed among the persons who compose that class at the date of distribution".

The *Gilliam* case is a leading case in New York and the above rule is quoted in full on page 465 of the opinion in *Matter of Koch*, 228 N. Y. 462, decided in 1940.

In 69 Corpus Juris, § 1279, page 265, appears the following:

"* * * where on the whole will the gift to the class is clearly uncertain and contingent, the class intended

is held to be that existing at * * * the time when the contingency is resolved * * *"

There cannot be any doubt but that the gift here was to a class on the happening of a contingency. The contingency which the testator contemplated was the death of his son, Fenton, without issue, prior to the death of his widow. The provisions covering that contingency became effective only after her death. He disposes, as of the death of his wife, only of such part of the remainder of his estate "existing at the death of my wife". Even the nature or extent of that remainder could not be ascertained until after the death of the widow and life tenant.

More evidence of futurity is found in the paragraphs of the will, numbered 1 and 2. The family residence (though not involved in this litigation as it was sold by the widow during her lifetime) was to remain in the name of Saunders as long as possible. If not previously sold it was to go to Fenton at his mother's death. "It being my intention" says the testator, "to give my said son the same power of disposition after his mother's death, as she, my wife, shall have." And if it had not been disposed of by either his wife or son, "it shall pass, at his death, to such of his children, if any, as he may by will direct, and in case he shall not make such direction it shall pass to such person or persons as would be his heirs at law."

After all these preliminary provisions and dispositions, after considering all other contingencies, the testator finally says, having in mind the final contingency of Fenton's death before the life tenant without issue, and with no near relative living, that the remainder should go to his, the testator's heirs, whoever they might be, on the widow's death.

There is no evidence anywhere that he contemplated his brothers and sister as his heirs. There is no justifi-

cation either in the will or the surrounding circumstances for a construction which would be so obviously strained and unnatural.

As the Heirs of the Testator Are Determined as of the Date of the Life Tenant's Death, the Statute Covering Representation in Force at That Time Controls.

* * * * *

The statute in effect at the time of the widow's death is District of Columbia Code (1940, Section 18-105) (Act of March 6, 1935, 49 Stat. 40 Ch. 28, Sec. 5). This section reads:

"18-105 (25,246) *Representation*. Whenever those entitled to share in the estate in fee simple in lands, tenements or hereditaments in the District of Columbia of an intestate, are all in the same degree of kindred to the intestate, they shall take per capita or by persons; and, where a part of them are dead and a part living, the issue of those dead shall take per stirpes or by stocks the shares of their deceased parents."

The heirs of the testator at the death of the widow were his nephews and nieces and the issue of such of them as had died before the life tenant, leaving issue the life tenant surviving.

Therefore, the remainder is divisible into seven parts as follows:

- 1/7th per stirpes to the issue of testator's nephew,
Emmet Leach
- 1/7th per stirpes to the issue of testator's nephew,
Mark Leach
- 1/7th to Fred G. Leach, sole issue of testator's nephew,
Everett Leach
- 1/7th to testator's nephew, Norman B. Saunders
- 1/7th to testator's niece, Mildred F. Saunders

1/7th to testator's nephew, Clarion Spencer Saunders
1/7th per stirpes to the issue of testator's niece, Tuna
Saunders Russell

The judgment of the District Court should in all respects
be affirmed.

Respectfully submitted

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Alfred E. Leach and
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No. 9404

No. 9405

BRIEF FOR MILDRED FRANCES SAUNDERS, CLARION SPENCER SAUNDERS, WILLIAM R. RUSSELL, PERCY H. RUSSELL, JR., CONSTANCE A. RUSSELL, SPENCER S. RUSSELL, INCOMPETENT, AND FRANCES RUSSELL MYERS, APPELLEES

United States Court of Appeals

DISTRICT OF COLUMBIA

CENTRAL DISPENSARY AND EMERGENCY HOSPITAL,
OF THE DISTRICT OF COLUMBIA, ET AL.,
Appellants,

v.

MILDRED FRANCES SAUNDERS, ET AL., *Appellees.*

NORMAN B. SAUNDERS, *Appellant,*

v.

MILDRED FRANCES SAUNDERS, ET AL., *Appellees.*

Appeals from the District Court of the United States
for the District of Columbia

United States Court of Appeals
for the District of Columbia

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COUNTER STATEMENT OF THE CASE

The statement of the case in the brief for Norman B. Saunders is sufficient for the purposes of this brief, subject to the following comments.

The statement on page 7 of that brief outlining the contentions of these appellees as to the effect of the old and the new statutes relating to distribution is inaccurate in several respects. For instance, their claim is not based on the number of "nephews and nieces who survived Lorin", but on the number of nephews and nieces who either survived Julia I. Saunders, or left descendants surviving her. This was the basis of the judgment below, and these appellees contend that this judgment was correct.

There is a minor error on page 3, where Juliet Saunders Leach is referred to as "Julia S. Leach" in line 7 and again in line 20; and there is some apparent confusion at the bottom of page 7 as to the number of shares to which the descendants of Juliet Saunders Leach will be entitled under the judgment below.

The judgment awarded "an equal share to each of the nephews and nieces of Lorin M. Saunders who survived Julia I. Saunders, and a like share to the issue collectively of any nephew or niece of Lorin M. Saunders who predeceased Julia I. Saunders leaving issue who survived Julia I. Saunders." The Court found that there were two nephews and a niece (Norman B. Saunders, Clarion Spencer Saunders, and Mildred Frances Saunders) who survived Julia I. Saunders, and that five children of Tuna Saunders Russell, a deceased niece, survived Julia I. Saunders. The judgment then concluded with the following paragraph:

"The Court does not at this time adjudge the interest, if any, of any descendant of Juliet Saunders

Leach, it not being shown by the record now before this Court who, if any, of her descendants survived Julia I. Saunders”.

There is now pending before this Court a motion (consented to by all parties to the consolidated cases) on behalf of Fred G. Leach and ten other descendants of Juliet Saunders Leach for leave to appear as parties appellees herein. From this motion it appears that none of the children of Juliet Saunders Leach survived Julia I. Saunders, but that three of her children (Emmet Leach, Mark Leach, and Everett I. Leach) left descendants surviving Julia I. Saunders.

Thus the statement at the bottom of page 7 of the appellant's brief that under the contention of these appellees the shares of Norman B. Saunders, Clarion Spencer Saunders and Mildred Frances Saunders and the issue collectively of Tuna Saunders Russell would be one-seventh each is correct; but only three-sevenths would belong to the descendants of Juliet Saunders Leach (instead of four-sevenths as stated in appellant's brief). It is believed that there is no disagreement on this point and that the reference to four-sevenths on page 7 of appellant's brief was an inadvertence.

Under the judgment below (and in the event that the motion of the eleven descendants of Juliet Saunders Leach is granted) the division would be as follows:

To Norman B. Saunders, Clarion Spencer Saunders, and Mildred Frances Saunders, one-seventh each; to the five children collectively of Tuna Saunders Russell, one-seventh; to the “issue collectively” of Emmet Leach, one-seventh; to the two children of Mark Leach, one-seventh; and to Fred G. Leach, only child of Everett I. Leach, one-seventh.

Although the will of Lorin M. Saunders contained no paragraph numbers, the appellants in No. 9404 have sup-

plied numbers for the pertinent paragraphs (see pp 2, 3 and 4 of their brief), and the same numbers will be employed in this brief. For convenient reference the six paragraphs bearing appellants' numbers 3 to 8 are set out below:

3. "And after the payments of my just debts, I give, devise and bequeath all the rest, residue and remainder of my estate, both real and personal, of which I may die seized, to my wife, Julia Isobelle Saunders, in trust with full powers to sell, mortgage, or convey the same in fee simple or otherwise, as in her judgment may be expedient, and the purchaser or purchasers thereof shall not be required to see to the application of the purchase money. And the income or proceeds of the sale of such property shall be applied and used for her support and maintenance, and for the support and education of my said son, it being my desire that he shall be given a college education.

4. "And when my said son shall arrive at the age of twenty-five years, I direct such of the remainder of my property, real or personal, other than the residence property, then undisposed of and not used for, or necessary for the purposes of her maintenance or support aforesaid, shall be conveyed or given to him absolutely, if in the judgment of my said wife it is expedient so to do; but not otherwise. For if my said wife so desires, and shall deem it best for the welfare of our son, Fenton, she may keep the whole of said property for such time, after he arrives at the age of twenty-five and until she may deem it expedient to convey to him the real estate and give him the personal property then remaining, even though it be for her natural life.

5. "It is my desire that my said wife shall have full power and authority to dispose of any or all of my property whether real or personal when she may deem it for the best interest of my estate to do so.

6. "And that she may use the income, or principal from my estate if necessary for the proper support and maintenance of herself and my son, the amount

so expended or used being left to her discretion intending only, that such part or the remainder of my estate, existing at the death of my wife, if not conveyed or turned over to my son, by her, prior to her death, as herein provided, shall pass to him or his heirs absolutely.

7. "And in case my wife shall die before our son, Fenton, reaches the age of twenty-five years, then I request that application shall be made to the court for the appointment of some suitable person to carry out the trust herein, provided until he reaches such age, at which time and in that event all of my property then remaining shall pass to and become vested in my son absolutely.

8. "And in case my said son shall die without leaving lawful issue, the whole of my estate, after the death of my wife, shall pass and descend to my heirs at law."

SUMMARY OF ARGUMENT

The consolidated case presents two principal questions:

(a) Does the property in controversy belong to the collateral kindred of Lorin M. Saunders or does it belong to the residuary legatees of his widow, Julia I. Saunders? (This is the issue in No. 9404).

(b) If it belongs to the collateral kindred of Lorin M. Saunders, how is to be divided among them? (This is the issue in No. 9405).

Lorin M. Saunders devised the property in controversy to his collateral relatives.—Lorin M. Saunders did not intend by the words "my heirs at law" in paragraph 8 of his will to designate either his son or his wife, for he and made complete provision for them both during their lives (and for the son in fee in the event he or his lawful issue survived the wife) in the preceding paragraphs of the will; and the contingent devise to the testator's "heirs

at law" in paragraph 8 was intended as an alternative or substitute devise of the remainder to his own collateral relatives after the death of the wife in the event the son (his only child) had previously died without leaving lawful issue.

The plan of the will is clear and simple. The property is conveyed to his wife for life as trustee with power to use as much as necessary for her own support and maintenance and the support and maintenance of their only child. There are three alternative devises of any property remaining in her hands at the time of her death, each one of which is contingent on the happening of certain events to take place after the death of the testator, and before the devise can take effect in possession or become a vested estate, as follows:

(1) To the son in fee if he survives the wife and has attained the age of twenty-five years before her death (paragraph 6).

(2) To the son in fee (after an intervening court-appointed trusteeship) if he survives the wife but does not attain the age of twenty-five years until after her death (paragraph 7).

(3) To the "heirs at law" (the collateral relatives) of the testator if the son has died without leaving lawful issue thus extinguishing the testator's direct line before the death of the wife (paragraph 8).

It is obvious that provisions (1) and (2) never became effective, because there were two contingencies in each that never happened. It is likewise obvious that provision (3) did become effective, since the son did die leaving no issue before the wife died.

Under the definition of section 45-812 of the District of Columbia Code (1940) and the decisions of this court, provisions (1) and (2) were for contingent future estates;

but even if they had been for vested future estates (as is contended for by appellants in No. 9404) they were subject to become divested (and actually were divested) on the failure of the conditions on which they depended and upon the happening of the contingency that made substitutional or alternative provision (3) effective.

Under the decisions of this Court (and by the overwhelming weight of authority in other jurisdictions) the reference in paragraph 8 of the will to the death of the son without leaving lawful issue meant his death at any time prior to the death of the wife (the life tenant); the phrase "heirs at law" meant those persons who would have been the heirs at law of the testator if he had died immediately after the death of the wife; and the respective shares of the devisees should be determined under the law in effect at that time.

An examination of the entire will in the light of the circumstances surrounding the testator, his family and property at the time of the making of the will indicates that the testator intended by paragraph 8 to devise the remainder of his estate to his own collateral relatives (rather than to the relatives of his wife) in the event his own direct line was extinguished by the death of his son without issue.

The law in effect when the wife died determines the method of distribution.—Appellant Norman B. Saunders attacks the judgment below on two grounds (1) that the Court erred in holding that Lorin M. Saunders intended that his property be divided according to the statutes of descent in force at the time of Julia's death rather than at the time of his own death or Fenton's death, and (2) that the judgment violates section 18-103 of the District of Columbia Code (1940) which requires that an heir be "in being and capable in law to take as heir at the time of the intestate's death." The answer to both conten-

tions is that the Court below did not determine the heirs of Lorin M. Saunders—it ascertained his devisees; holding, in effect, that the testator had designated as his devisees *those persons who would have been his heirs at law if he had died immediately after the death of his wife, Julia*. If the intention of the testator has been correctly interpreted by the Court below, he intended to include his collateral relatives in being and capable of taking at the time of the death of the life tenant, rather than those in being and capable of taking at the time of his own death, and to have the statutes of descent (including section 18-103) applied as of the date of the death of the life tenant.

ARGUMENT

1. **The Intention of Lorin M. Saunders Was That the Remainder of His Estate Should Go to His Collateral Relatives in the Event the Contingent Devisees to the Son Failed by Reason of the Death of the Son Without Issue.**

The will of Lorin M. Saunders was executed on February 25, 1905, less than three months before his death (App. 19). His only child (his son Fenton) was at that time twelve years old. The will contained no reference to other possible children and no provision for them; and it is clear from the entire will that none were contemplated. The testator did have two brothers and a sister, and his wife also had collateral relatives.

The will divides the testator's estate into two groups: (1) the residence property, and (2) the residue of the estate, both real and personal.

As to the residence, the will devises it to the wife for life, then to the son, "and in case the said property is not disposed of by either my wife or son, it shall pass at his

death to such of his children if any, as he may by will direct, and in case he shall not make such direction, it shall pass to such person or persons as would be his heirs at law''.

As to the residue (which is the property involved in this case) the entire estate was devised to the wife in trust, and complete provision was made in paragraphs 3 to 7 for the wife and son during their lives, for which purpose the principal could be invaded to the extent deemed necessary, and also complete provision was made for the issue of the son in the event he had any issue; but no provision having been made to cover the eventuality that the testator's direct line should become extinguished by reason of the death of the son without issue before the death of the wife, the testator added paragraph 8 as the final devise in the will—"And in case my said son shall die without leaving lawful issue, the whole of my estate, after the death of my wife, shall pass and descend to my heirs at law''. This devise to the "heirs at law" was a substitute provision for the disposition of the remainder of the estate in the event that both of the preceding contingent devises of the remainder to the son in fee failed because of the death of the son without issue before the death of the wife; and obviously, the testator did not intend to include either the son or the wife in the phrase "my heirs at law'', because by the express terms of his will they would both be dead (the son without having left issue) *before the devise to testator's "heirs at law" could become effective*. This intention is clear from the will itself, even without the aid of the surrounding circumstances.

However, if there is any doubt of the intention of the testator, his intention "is to be ascertained by an examination of the language of the will in the light of the facts and circumstances surrounding him, his family and property at the time of making the will" (*Costello v.*

Costello, 80 U. S. App. D. C. 75, 149 F 2d 379). So examined, it is clear that after the death of his only son without issue and after the death of the wife, there were left only the next of kin of the testator and the next of kin of the wife. The testator elected to leave the property to his own next of kin, and the words he used in the will "my heirs at law" were appropriate for the purpose. His wife so understood them, and maintained a separate schedule of her husband's estate, and provided in her will that "the property which I received from my late husband is to be distributed in accordance with the terms of his will". This testimony by one who was of all persons most likely to have known of her husband's intentions (in the nature of an admission against her own interest) is entitled to great weight.

The Court below found that it was the intention of the testator to provide that if his only son died without issue before the wife died, the remainder of the estate should go to the collateral heirs of Lorin M. Saunders upon the death of Julia I. Saunders; and held that the identity of the collateral heirs entitled to share and the method of distribution should be determined by the law in force and effect at the time of the death of Julia I. Saunders.

Appellees submit that that finding and holding were correct.

2. The Devises of the Remainder to the Son in Paragraphs 6 and 7 Were Contingent; and Failed by Reason of the Death of the Son Without Issue Before the Death of the Wife.

The third paragraph of the will devises the residue of the estate to the wife in trust, "with full power to sell, mortgage, or convey the same", and to apply the income or proceeds of the sale for her support and maintenance and the support and maintenance of the son.

The fourth paragraph provides that when the son shall arrive at the age of twenty-five years the remainder of the property then undisposed of and not used for or necessary for the purposes of her maintenance "shall be conveyed or given to him absolutely, if in the judgment of my said wife it is expedient so to do; but not otherwise." Said paragraph also provides that the wife may in her discretion "keep the whole of said property for such time, after he arrives at the age of twenty-five and until she may deem it expedient to convey to him the real estate and give him the personal property then remaining, even though it be for her natural life".

The fifth and sixth paragraphs are connected by the word "and", and are grammatically parts of a single sentence, although separated by a period. They contain repetitions of provisions in the third and fourth paragraphs, apparently inserted in an effort to make it clear that the wife may invade the principal if necessary for the proper support and maintenance of herself and the son. The sixth paragraph concludes with the following clause—"the amount so expended or used being left to her discretion intending only, that such part or the remainder of my estate, existing at the death of my wife, if not conveyed or turned over to my son, by her, prior to her death, as herein provided, shall pass to him or his heirs absolutely".

Since the son must attain the age of twenty-five years before the wife would be authorized to convey or turn over to him any part of the estate, it seems clear that the provision in the sixth paragraph that any part of the estate not conveyed or turned over to the son by the wife, prior to her death, as provided in the will, "shall pass to him or his heirs absolutely" is intended to take care of the situation where the son has attained the age of twenty-five years, but the wife has, in her discretion, refrained from conveying to the son some or all of the

property at that time, and thereafter dies still holding some or all of the estate. In that event, the sixth paragraph provides that such part of the estate as remains in her hands at the time of her death "shall pass to him or his heirs absolutely".

If there were otherwise any doubt that the devise in the sixth paragraph was intended to take effect only in the event the son attained the age of twenty-five years before the wife died, that doubt would be dispelled by the provisions of the seventh and eighth paragraphs. The seventh paragraph contemplates the possibility that the son may fail to attain the age of twenty-five years before the wife dies, and provides for the appointment by the Court of another trustee in the place of the wife, who shall serve as such until the son attains the age of twenty-five years "*at which time and in that event*" the property "*shall pass to and become vested in my son absolutely*"; and the eighth paragraph provides for the disposition of the estate after the death of the wife in case the son shall die without leaving lawful issue. It is clear from the language of the will that paragraph 6 was contingent on the son surviving the wife and attaining the age of twenty-five years *before* her death, and that paragraph 7 was contingent on the son surviving the wife and attaining the age of twenty-five years *after* her death. The remainder is not to "pass to and become vested in" the son until he reaches the age of twenty-five years. Assuming that the eighth paragraph refers (as appellees will undertake to show hereinafter that it does refer) to the death of the son *at any time prior to the death of the wife*, then the sixth, seventh, and eighth paragraphs present a complete and consistent plan for the disposition of the remainder of the testator's estate, as follows: (1) if the son survives the wife and attains the age of twenty-five before her death, the sixth paragraph becomes effective; (2) if the son survives the wife, but has not at-

tained the age of twenty-five at her death, the seventh paragraph becomes effective; and (3) if the son fails to survive the wife and leaves no lawful issue, the eighth paragraph becomes effective.

If this Court accepts the foregoing as the reasonable and proper interpretation of the will, then it follows that the devises in the sixth and seventh paragraphs created nothing more than contingent future estates within the meaning of the District of Columbia Code (1940) Section 45-812, which provides that a future estate "is contingent when the person to whom or the event upon which it is limited to take effect in possession or become a vested estate is uncertain".

"The language to be construed is the language of contingency. It is 'if any one of my said three children should die leaving a descendant'. Thus, an event which might or might not have happened is described, and upon that event, if it happened, another devisee was to take in place of the first named devisee." *Pyne v. Pyne*, 154 F. 2d 297, 74 Wash. Law Rep. 476, May 24, 1946.

3. Even If the Devises to the Son in Paragraphs 6 and 7 Be Treated as Vested, They Became Divested on the Death of the Son Without Issue Before the Death of the Wife.

Appellants in No. 9404 contend that the use of the word "or" in paragraph 6 changes the future estate in the remainder provided for by that paragraph from a contingent to "an alternative vested" estate. Appellees submit (1) that the word "or" in that paragraph had exactly the same meaning as if the testator had used the word "and", (2) that, even if the word "or" did operate to create an alternative future estate (in the son *or* his heirs), said alternative estate would still be contingent pending such time as the son attained the age of twenty-five years and survived the wife, and (3) that, even if it

were technically a vested alternative estate, it would still be subject to being divested on the failure of the conditions on which it depended and on the happening of the events which caused the substitute provisions of the eighth paragraph to become effective.

“Where a will gives an estate to a devisee ‘or’ his heirs or legal heirs, or issue, the word ‘or’ will be construed as ‘and’. *Noble v. Teeple*, 49 P. 598, 599, 58 Kan. 398; *Parkin v. Knight*, 15 Sim. 85, 87; *Penny v. Turner*, 15 Sim. 368, 371; *Lachlan v. Reynolds*, 9 Hare 796, 798; *Read v. Snell*, 2 Atk. 642; *Harris v. Davis*, 1 Colly. 416, 423; *Wright v. Wright*, 1 Ves. Sr. 409, 411; *Miller v. Gilbert*, 38 N. E. 979, 980, 144 N. Y. 68; *Sorver v. Berndt*, 10 Pa. (10 Barr) 213, 214; *Slingluff v. Johns*, 39 A. 872, 875, 87 Md. 273; *Williams v. Williams*, 16 S. W. 361, 363, 91 Ky. 547.”

30 Words and Phrases (Permanent Ed.) p. 59

In this connection attention is invited to the fact that the quotation from paragraph 6 of the will on page 7 of appellants’ brief is inaccurate. There was no comma in the will between the word “him” and the phrase “or his heirs absolutely”; and the word “or” and the words “turned over” were not italicized in the will (App. 18). It is clear from the last sentence in paragraph 4 of the will that the testator had in mind that the wife might in her discretion when the son reached the age of twenty-five, “convey to him the real estate and give him the personal property then remaining”, and there is no reason to suppose (as suggested by the appellants) that he was not maintaining the same distinction between real and personal property in paragraph 6 when he referred to the remainder of the estate “not conveyed or turned over to my son, by her, prior to her death”.

But it is immaterial for the purposes of this case whether the future estates contemplated by paragraphs 6 and 7 be treated as contingent or vested, because the failure of the son to survive the wife and to attain the

age of twenty-five years, and his death without leaving issue before the death of the wife, were just as effective to defeat a *vested* future estate as a *contingent* future estate.

“As we view the matter, it is unimportant whether the remainder be treated as contingent or vested. If it be contingent, the contingency happening before the remainder could vest, nothing passed to appellant as the legatee of Elizabeth Stockdale, deceased. If the remainder be treated as vested, it was subject to a defeasance by a condition subsequent, namely, the death of Elizabeth Stockdale before that of the surviving life tenant, Susan Frances Clark. *Richardson v. Penicks*, 1 App. D. C. 261; *Craig v. Rowland*, 10 App. D. C. 402; *Fields v. Gwynn*, 19 App. D. C. 99; *Cruit v. Owen*, 25 App. D. C. 514; *Johnson v. L. & T. Co.*, 33 App. D. C. 242; *Green v. Gordon*, 38 App. D. C. 443; *Doe v. Considine*, 6 Wall. 458, 18 L. Ed. 869.”

Jewell v. Graham, 57 App. D. C. 391, 24 F. 2d 257

“Whether vested or contingent, John Pyne’s interests were assignable, but he could assign only that which he had. If his vested interest was defeasable, his assignment was subject to the same defeasance, and likewise his assignment of his contingent interest was subject to the conditions upon which he had the interest.” *Pyne v. Pyne*, *supra*.

The following statement of the rule in the Restatement of the Law of Property—Future Interests—subparagraph i of section 250 is to the same effect:

“i. IMMATERIALITY OF WHETHER REQUIREMENT OF SURVIVAL IS A CONDITION PRECEDENT OR A BASIS FOR DEFEASANCE. In many controversies the determination of the existence or non-existence of the requirement of survival fully resolves the problems at issue. A failure to survive to the end of the period for which the requirement exists ends the interest equally whether survival was a condition precedent or a basis for the defeasance of the interest in question.” (Vol. 3, p. 1263).

See also *Daniel v. Whartenby*, 84 U. S. 639; *Herrell v. Herrell*, 47 App. D. C. 30; *Britton v. Thornton*, 112 U. S. 527, 28 L Ed. 817.

4. The Death of the Testator's Son Without Issue Prior to the Death of the Wife Made the Devise to the Testator's "Heirs at Law" in Paragraph 8 Effective.

The appellants in No. 9404 argue (or seem to argue) that the eighth paragraph could not have been intended as an alternate or substitute devise for paragraph 6 and 7 because the reference to the death of the son in paragraph 8 meant "his death during the lifetime of the testator" (page 29 of their brief). Therefore, (they argue) there is no provision in the will to cover the contingency of the son dying without issue after the death of the testator, unless the sixth paragraph is held to create an alternative vested estate in the son "or" his heirs.

The answer to that argument is that this Court decided the point in *Pyne v. Pyne*, supra, and held under analogous facts that the reference was to the death of the remainderman prior to the death of the life tenant. The discussion of that issue by this Court in the *Pyne* case was thorough and conclusive and many authorities were cited in support of the rule adopted by the Court. One of the reasons stated by the Court for its ruling (which would, of course, be equally applicable to the instant case) was that "it may reasonably be supposed that the testatrix would contemplate taking care of events before her death by a new will, or a codicil"; and that the clause of the will under consideration was inserted to "provide for events after her death but before the time when the devise in fee became possessory". The following excerpt is from the opinion of this Court:

"The only class of cases in which we find the authorities in agreement in fixing the lifetime of the

testator as the time of the effectiveness of a clause relating to the death of a devisee, are those in which the devise is directly to A and if A die (or should A die), then to B. There no contingency is stated, and no life estate intervenes. * * *

“When a contingency is added to the reference to the death of the devisee—as ‘Blackacre to A and if he die without issue, to B’—a different situation is presented, because, whereas ‘if A dies’ is not a contingency, ‘if A dies without issue’ is a contingency. At common law the latter clause was held to refer to the indefinite failure of issue of A at any time, i. e., the running out of his line. That rule was changed by the Statute of Wills in 1838. Under that statute, failure of issue is to be construed as referring to the death of the named devisee. *When a life estate intervenes, an additional consideration is introduced because another possibility of time is involved, the death of the life tenant.* * * *

“In this country the cases are somewhat in confusion, but the great weight of authority supports the rule that, absent a statute, where a will refers to the death of a remainderman survived by issue, without specifications as to time, *his death prior to the death of the life tenant is meant.*” (Italics supplied)

It is interesting to note that of the six court decisions cited by the appellants in support of their contention, three are Maryland cases (Appellants Brief, pp. 30, 31). But in the decision of this Court in the *Pyne* case, all three of these Maryland decisions are distinguished on the ground that they relate in whole or in part to direct devises (and not to remainders). In the course of his discussion of these and other Maryland decisions, Justice Prettyman (writing the opinion for this Court) makes the following comment:

“Running through the Maryland cases, we find the doctrine that where a life estate, or a term of years, intervenes, references to substitutions in the event of the death of the remainderman without issue, or

with issue surviving, are construed to refer to the period prior to the death of the life tenant. * * * The rule thus stated has repeatedly been applied. See *Booth v. Eberly*, 124 Md. 22, 91 Atl. 767 (1914), and cases there cited."

5. Under the Rule Laid Down by This Court in *Costello v. Costello* the "Heirs at Law" of Lorin M. Saunders Are to be Ascertained as of the Date of the Death of his Wife.

The appellants in No. 9404 stand on the technical meaning of the phrase "heirs at law", and contend in one of the major headings of their brief (p. 12), that "the heirs of a person are to be determined as of the date of the death of the decedent unless the will clearly designates some other date". But that is not an entirely accurate statement of the rule as it is applied by this Court and by the great weight of authority. A better statement would be that while a devise to the "heirs at law" of a testator will ordinarily be construed as referring to those who are such at the time of his death, that rule will not be followed where a different intention is clearly manifested in the will; and that the intention of the testator is to be ascertained by an examination of the language of the entire will in the light of the facts and circumstances surrounding the testator, his family and property at the time of making the will. The rule is so stated by this Court in *Costello v. Costello*, 80 U. S. App. D. C. 75, 149 F. 2d 379, and is fully supported by the authorities there cited. That decision is believed to be controlling on the instant case, and will be discussed more fully hereinafter, both under this issue and under that relating to the statute applicable to the determination of the identities and respective interests of the collateral heirs.

The facts in that case, and the issues decided, are so closely analogous to the facts and the issues in the in-

stant case, that appellees respectfully request the Court to read the entire opinion by Chief Justice Groner (which is less than two pages in length) as a part of this brief.

The will in the *Costello* case provided that: "After the death of my brother Jeremiah Costello, I give and devise the real estate devised to him, 'for life, in the second item hereof, to such persons as may at the time of the death of my said brother be my heirs at law, in fee simple and absolutely'".

Paragraph 8 of Lorin M. Saunders' will provided that: "And in case my said son shall die without leaving lawful issue, the whole of my estate, after the death of my wife, shall pass and descend to my heirs at law".

This Court stated that the above quoted language from the *Costello* will clearly showed the purpose of the testatrix "to have the will speak as to the remainder as of the death of the brother" and added that this was "the reasonable and natural result to be expected", since upon the death of the brother "all her heirs would be in the same degree of relationship to her—and there is nothing to indicate any preference for some of the nieces or nephews over the others".

Applying the same reasoning to the Saunders will, it may be said that the language of the will clearly shows the purpose of the testator to have the will speak as to the remainder as of the death of the wife, and this was the reasonable and natural result to be expected, since upon the death of the wife (the son having predeceased her without issue) the testator's heirs would be his collateral kindred whom he would quite naturally prefer to his wife's relations.

If we list the expressions in the will indicative of the intention of Lorin M. Saunders that the devisees designated by him as his "heirs at law" should be determined after the death of the son without issue and after the

death of the wife, and add to them the facts and circumstances surrounding the testator, his family and property at the time of making the will, which further evidence that intention, we will find that we have all of the essential elements on which this Court found a similar intention in the *Costello* case, plus several very persuasive elements not present in the *Costello* case. Here are some of them:

(1) A comparison of the language of Item 5 of the will in the *Costello* case with paragraph 8 of the Saunders will, shows a striking similarity both in the provisions and in the language employed. Both contemplate the future disposition of the remainder *after the death* of the designated heir and *after the death* of the life tenant; the expression "I give and devise" in the *Costello* will is less indicative of futurity than the phrase "shall pass and descend" employed by Lorin M. Saunders; and the condition in the Saunders will "in case my son shall die without leaving lawful issue" is at least as clear an indication of the intention to exclude him from the devise of the remainder as the expression "after the death of my brother Jeremiah" in the *Costello* will. Both wills used the identical expression in designating the devisees of the remainder—"my heirs at law".

(2) The fact that the plural word "heirs" was used in describing the devisees of the remainder in the Saunders will is further evidence that the testator did not mean his only son. Throughout the will (including the preceding alternative devises in the sixth and seventh paragraphs of the will) whenever the testator referred to his son Fenton, he either called him by name or referred to him as "my son". He never referred to him as his "heir". There is therefore a fair presumption that if he had meant his son in paragraph 8 he would not have called him "my heirs at law". This feature was not present in the *Costello* will.

(3) It is reasonable and natural that the testator should prefer that on the extinguishment of his direct line, his estate should go (after the death of his wife) to his own relatives rather than to those of his wife. In the *Costello* case this Court gave weight to the fact that the testatrix would be presumed to prefer an equal rather than an unequal distribution among relatives of the same degree.

(4) Each one of the three alternative devises of the remainder in the will looked beyond the death of the testator to the happening or non-happening of the events that should determine the final disposition of the remainder.

(5) The fact that the devisee of the prior alternative interest in the same remainder was the sole heir of the testator has been held by some courts as sufficient evidence in itself to establish an intention of the testator to have his "heirs at law" ascertained as of the death of the life tenant.

(6) The fact that by the prior provisions of the will the son and his issue and the wife are taken care of under all possible contingencies indicates that the sole purpose of the eighth paragraph is to provide for the devise of the remainder over to other "heirs" of the testator in the event his direct line has become extinguished.

(7) The testator provided that two events must happen *after the death of the testator* (namely, the death of the son without issue and the subsequent death of the wife) before it could be determined, either (a) whether the alternative preceding devises would fail, (b) who would take as the testator's "heirs at law", or (c) how much, if any, property would remain in the hands of the wife at her death to be taken by the "heirs at law".

(8) The wife (who was the person most likely to have known what the intentions of the testator were, and the only one whose interests were adversely affected at the

time) inserted a provision in her own will which can not possibly be construed otherwise than as an admission that the remainder of her husband's estate should go to his collateral heirs.

6. The Authorities Relied Upon By Appellants in No. 9404 Do Not Controvert the Rule That the Intention of the Testator Must Prevail Over the Technical Definition of the Word "Heirs".

Commencing on page 15 of their brief appellants in No. 9404 cite a number of cases to support their contention that the term "my heirs at law" in the will must be given its technical meaning. The decisions cited by them may be divided into two classes.

The first group comprises two decisions of the Supreme Court, one decision of this Court, and one Delaware decision cited on page 16 of their brief to support the general proposition that "clear language is necessary to disinherit an heir, and the courts will resolve any reasonable doubt in his favor". But this proposition has no relevancy to this case, and the decisions cited are therefore not in point. Although the appellants stress the claim that the appellees are seeking to disinherit the testator's only son, Fenton, and that therefore all of the presumptions should be against them, it is submitted that their theory is so highly technical that it amounts to a fiction. How can the only son be disinherited by a provision that in the event he shall die without leaving lawful issue, his father's estate, after the death of his mother, shall go to his father's relatives instead of to his mother's relatives? The appellees are merely trying to prevent the dead son from being accorded a theoretical resurrection twenty years after his death, and used as the vehicle by which the testator's estate may be diverted from his own blood relatives to strangers, contrary to the expectations, and apparently contrary to the desires of the testator, the son, and the wife. There is no policy of the law against

permitting the testator to devise his property to his own kindred. In fact it is an accepted rule of construction that "of two equally probable interpretations of a will, that shall be adopted which prefers the family and kindred of the testator to utter strangers". *Sherman v. American Security and Trust Co.*, 57 App. D. C. 273, 275, 20 F. 2d 476.

The other group of cases cited by appellants to support their contention that the words "my heirs at law" must be taken in their technical sense (commencing on page 17 of their brief) is distinguishable on the facts from the instant case and from the *Costello* case; the court having in the cases relied upon by appellants found from the peculiar language of the will or the special circumstances that the testator intended the words "my heirs at law" to be given their technical meaning and to include those persons who were his heirs at the time of his death.

There have been very many decisions within this general field of controversy, i. e., as of what date shall devisees in a will be ascertained when they are designated by the testator as "my heirs", "my heirs at law", "my next of kin", and similar expressions. Some of these are discussed and digested in the Annotation in 49 A. L. R., referred to in footnote 4 to the decision in the *Costello* case, and in the supplementary annotation in 127 A. L. R. commencing on page 602.

Each case depends on its own individual facts and circumstances, the rule to be applied being universally recognized; but the results sometimes appear to be inconsistent because of the widely varying language and provisions in the wills and the different circumstances surrounding the testator, his family and property at the time of the execution of the will.

The cases cited by appellants are from seven different states; but a reference to the digests discloses that there

are other decisions in each of those seven states in which the same courts under slightly different language and surrounding circumstances have held that the testator intended his "heirs" or "heirs at law" to be ascertained as if he had died at the date of the death of the life tenant.

For examples:

(1) In Massachusetts, in a more recent case than any of those cited by appellants from that state (see pages 17, 18, 19, of their brief) where the will created a trust for the benefit of the testator's children, and provided that in the event the children should die without issue their shares should go to the testator's "heirs at law", the court said that by the term "my heirs at law" it was improbable that the testator meant his dead children, but that on the other hand "a clear intention appears to use the words to indicate heirs to be ascertained as if the testator had died immediately after George G. Hall" (the life tenant). *Boston Safe Deposit and Trust Co. v. Waite* (1932) 278 Mass. 244, 179 N. E. 624.

(2) In Rhode Island, in *Taber v. Talcott* (1917) 40 R. I. 338, 101 Atl. 2, 5, the Court distinguishes (and appears to apologize for) its earlier decision in *Kenyon, Petitioner*, the sole case in that jurisdiction cited by the appellants (pages 19-20 of their brief) and held that by the words "my heirs at law" the testator meant "those persons who would answer the description of his heirs at law at the time of the death of the last survivor of his wife and children, if he had just then died intestate and without issue".

(3) In New Jersey, in a more recent case than *Tuttle v. Woolworth* (quoted on pages 20 and 21 of appellants' brief) the court used the following language: "The intention is apparent throughout the whole instrument to provide support for the testator's wife and children dur-

ing their lives with the remainder in certain proportions to the issue, if any, and in the event that the children should die without issue the estate was then to go to the testator's heirs at law and next of kin. He intended by the use of those words in this elaborately drawn instrument to transmit the estate to a class of heirs different from his wife, children and their issue. He clearly intended that the collateral branch of his family should take and enjoy his frugality upon default of the direct line." *Carter v. Martin* (1938) 124 N. J. Eq. 106, 199 Atl. 589, 590.

See also *Genung v. Best* (1926) 100 N. J. Eq. 250, 135 Atl. 514, cited by this Court in a footnote to the *Costello* decision.

(4) In Pennsylvania, appellants rely upon *Tatham's Estate*, 250 Pa. 269, 95 Atl., 520. But in the more recent case of *Warne's Estate*, (1931) 302 Pa. 386, 153 Atl. 688 where the will provided that "should both of my said sons die without issue, then upon the death of the survivor, I direct that my estate shall go to such persons as would then be entitled under the laws of this state, if I had died intestate", it was held that the testator by this language intended to designate the death of the last surviving life tenant "as the period for determining who were the heirs and next of kin of testator".

(5) In Illinois, the Court held in *Bond v. Moore*, (1908) 236 Ill. 576, 36 N. E. 386, 391, that "the devise comes within the rule that, where there is a gift to one for life, with remainder to the testator's next of kin, and the life tenant is the sole next of kin at the death of the testator, the remainder will be considered as given to the persons answering the description at the termination of the estate for life. *Johnson v. Askey*, 190 Ill. 58, 60 N. E. 76".

And *Johnson v. Askey* (cited at the end of the above quotation) distinguishes *Kellett v. Shepard*, relied upon and quoted by appellants (on pp. 23 and 24 of their brief),

on the ground that in *Kellett v. Shepard* "the testator left more than one heir him surviving, and there was nothing to show that the testator did not intend the remainder to vest, immediately upon his death, in his heirs him then surviving".

Of course the case of *Himmel v. Himmel* (quoted at length on pages 25, 26 and 27 of appellants' brief) is distinguishable on the ground that the will provided (and that was the basis of the decision) that the property "revert and go to my heirs as if no will had been made".

(6) In Virginia, see the more recent case of *Callis v. Ripley* (1933) 161 Va. 472, 171 S. E. 497, where the "heirs" of the testator were ascertained upon the theory that it was the intent of the testator to devise the remainder of his estate to an indeterminate and uncertain number of persons who might be in existence at the death of the life tenant without issue.

(7) In New York, appellants cite four decisions on page 28, without analysis or excerpts; but it is believed that none of them truly supports the proposition for which they are cited. One of them (*In re Wilson's Will*, 48 N. Y. S. (2d) 835, decided April 6, 1944) contains an analysis of the New York decisions and reaches the conclusion that the New York rule is that "where the gift of the remainder to the aforesaid class" (heirs at law, next of kin, etc. of the testator) "was contingent upon the failure of birth and survivorship of issue to designated persons or upon the happening of some other event which could only occur subsequent to decedent's death" the class "has been determined as of the date of the termination of the intervening life estate" (citing 13 New York decisions).

There are also many decisions in other jurisdictions that support the judgment of the Court below and observe the principles stated by this Court in the *Costello*

case. It is not feasible to attempt to analyze them within the permissible length of this brief. Some of them are digested in the annotation in 127 A. L. R. commencing at page 624 under the caption—"Where Gift is Contingent on Future Event—Remainders."

The general rule (applicable to cases where the death without issue of the sole heir of the testator is the event on which the devise over to the "heirs at law" of the testator depends) is stated in the Restatement of the Law of Property—Future Interest—in section 308 k. (Vol. 3 p. 1715) in the following language:

"If a person to whom a prior interest in the subject matter of the conveyance has been given is the sole heir of the designated ancestor at the death of such ancestor, there is some incongruity in also giving such person all the interest under the limitation to 'heirs' or 'next of kin'. The incongruity is especially great when a will conveys property 'to B and his heirs but if B dies without issue to my heirs' and B is the sole heir of A. The incongruity is almost as great when A, by will, conveys property 'to B for life then to my heirs' and B is the sole heir of A. Thus, the fact that in such cases, B is the sole heir of A at the death of A tends to establish that A intended his heirs to be ascertained as of the death of B, so that B is prevented from sharing in the limitation to the heirs of A.

"In other types of cases, the fact that a person to whom a prior interest is given is the sole heir of the designated ancestor tends to establish that the applicable statute is not to be applied until the death of the taker of such prior interest, thus preventing him from being included in the described group."

And see annotation in 49 A. L. R. pages 182, 183 and 184 where the same rule is stated at somewhat greater length with citations of cases.

7. The Identities of Those Entitled to Share and the Method of Distribution Should Be Determined Under the Law in Force and Effect at the Time of the Death of the Wife.

Appellant in No. 9405 (Norman B. Saunders) bases his appeal on one single point, which he states in the following language on page 10 of his brief:

“The Court below erred in holding that Lorin Saunders intended that his property be divided according to the statutes of descent in force at the time of Julia’s death rather than at the time of his own death or Fenton’s death.”

Appellant does not take a definite position as to which of the two alternative dates (that of the testator’s death or of Fenton’s death) is applicable nor does he cite any authorities to support either view, except negatively by his statement on page 26 that this case is distinguishable from *Costello v. Costello*.

He seems to rely entirely on the bare statement of the two following propositions:

(1) That “to hold that the identity of the collateral relatives was to be determined at Julia’s death, and further to hold that Lorin intended the distribution to be in accordance with the statute at Julia’s death, is to make an unwarranted inference upon an inference” (page 26 of his brief); and

(2) That “the judgment below violates a pertinent statute, and determines adversely the rights of parties not before the Court.” (page 27 of his brief).

Since these questions have been raised, appellees desire to answer them; but the failure of the appellant to indicate his own theory makes the approach necessarily somewhat general. This topic heading will be devoted to answering proposition (1) above, and the next following topic heading to answering proposition (2).

Appellant recognizes the fact that the decision of this Court in *Costello v. Costello* is against him unless it can be distinguished. But his effort to distinguish the two cases obviously fails. It is in the following language:

“Lorin merely said, ‘. . . the whole of my estate, after the death of my wife, shall pass and descend to my heirs at law’. He did not say ‘My then heirs at law’ or ‘my heirs at law living at Julia’s death’ or ‘my heirs at law to be determined as of the date of death of my wife’. In that respect this case is clearly distinguishable from *Costello v. Costello*, supra.” (p. 26)

But a glance at the comparable clause in the will in the *Costello* case, (previously set out herein) shows that the absence of the above phrases from the will in the Saunders case does not distinguish it from the *Costello* case, because there were no such phrases in the *Costello* will either. The fact is, as has already been pointed out herein, the language in the *Costello* will is similar in form, and still more similar in substance to that employed in the Saunders will; and the decision of this Court in the *Costello* case is authority for the proposition that under language and circumstances less persuasive than those in the instant case this Court will draw the inference that the testator intended “to have the will speak as to the remainder as of the death” of the life tenant, and “that the heirs should be determined as of the date of the death” of the life tenant.

Furthermore appellant has omitted from his quotation the very significant introductory phrase “And in case my son shall die without leaving lawful issue”, which, as we have already seen, means “And in case my son shall die without leaving lawful issue *before the death of my wife*”. This definitely supports the view that the testator was looking forward to events to happen after his death and before the death of his wife to determine who would receive the remainder after the death of the wife. In

addition to this evidence must be added the fact that this entire paragraph was a substitute contingent devise to take effect only if the preceding devises to the son failed by reason of his death without issue before the wife died (a factor not present in the *Costello* case).

In the *Costello* case it could have been determined at the death of the testatrix that on the death of the life tenant the entire estate willed to him for life would go to the nephews and nieces; yet the Court held that the devisees ("heirs at law" of the testatrix) were to be ascertained as of the date of death of the life tenant. In the instant case it could not have been determined at the death of the testator whether the remainder would go to the son or to the collateral heirs; and it could not be determined until the death of the life tenant which of the collateral heirs would be living and entitled to share, or how much, if any, of the estate would remain in her hands (unexhausted by her discretionary power to use it for her support and maintenance).

There is, therefore, no reason why the rule of the *Costello* case should not be applied to the even more persuasive facts of this case.

Some courts use such expressions as "to be ascertained as of the date of the death" (of the life tenant) and "to be ascertained as if the testator had died immediately after the death" (of the life tenant) interchangeably (*Boston Safe Deposit and Trust Co. v. Waite, supra; Taber v. Talcott, supra*); and it is believed that in all cases the meaning is the same, and contemplates the ascertainment of the "heirs" as if the testator had died at the time when the ascertainment of the "heirs" became necessary. This was certainly true in the *Costello* case; and the decision of this Court in that case was, in effect, a decision that the identities and respective shares of the "heirs at law" of the testatrix were to be determined as if she had

died immediately after the death of the life tenant, her brother Jeremiah.

A reference to the opinion of this Court in *Greenwood v. Page*, 78 U. S. App. D. C. 166, 138 F. 2d 921, will show that the court below also passed on this precise question in that case, but this Court affirmed the judgment on another ground which did not require it to decide this issue. In that case the grandchild (Wellington Cass Page) whose heirs were to be determined, died in 1915, and the testator died in 1916; but the last surviving child of the testator (the last life tenant) did not die until October 6, 1939. Under the laws of the District of Columbia in effect when the life tenant died Rufus Lee Page (a half brother) would have been an heir, whereas under the laws in effect when the will was made, or when the testator died, or when the grandchild died, he would not have been an heir. The court below (Justice O'Donoghue) held—

“That the legal heirs of Wellington Cass Page are to be determined as of the date of death of Ernest R. (E.) Wagar, the last life tenant, namely, October 6, 1939; That in accordance with the laws of the District of Columbia as of October 6, 1939, the legal heirs of Wellington Cass Page were his sister Marion W. Page Ross Greenwood and his half brother Rufus Lee Page * * * ” (78 U. S. App. D. C. at page 168)

At 69 Corpus Juris, page 207, the general rule is stated as follows: “The law to be applied in determining the meaning of the word ‘heirs’ in a will is ordinarily that of testator’s domicile and the statute to be applied is that in force at the time fixed for the ascertainment of the class * * * ”

The general rule is also stated in the following excerpts from the Restatement of the Law of Property—Future Interests:

"Sec. 305. Meaning of the Word 'Heirs' and Other Words of Similar Import.

"When a limitation is in favor of the 'heirs' of a designated person, or is in other words of similar import, then, unless a contrary intent of the conveyer is found from additional language or circumstances, the persons so described by the limitation as conveyees are those who, under the applicable local law, would succeed to property of the type which is the subject matter of the conveyance if such ancestor died owning the property and intestate at the time when the group is to be ascertained in accordance with the rule stated in Sec. 308." (Vol. 3, p. 1671).

"Sec. 310. Distribution of the Subject Matter of a Gift to 'Heirs', 'Heirs of the Body', 'Next of Kin', 'Relatives', and Other Groups Similarly Designated.

"When a limitation is made in favor of the 'heirs', 'heirs of the body', 'next of kin', or 'relatives', of a designated person, or in other words of similar import, and the members of the group are ascertained by the application of a statute governing the intestate succession of property at the time required by the rule stated in Sec. 308, the size of the share limited to each member of the group in the subject matter of such limitation is determined by the application of the same statute unless a contrary intent of the conveyer is found from additional language or circumstances." (Vol. 3, p. 1730).

It is clear from the context and the supporting illustrations that the above-quoted language from the Restatement of the Law of Property is applicable to wills as well as to other conveyances.

In *Lippincott v. Purtell*, 98 N. J. Eq. 569, 131 Atl. 210, the will provided in part—"and at the decease of my wife to descend to my lawful heirs". The statute relating to representation among children of brothers and sisters of a decedent was changed very materially after the death of the testator, but before the death of the life tenant—the wife. The court said:

“The Act of 1918 was in force when the life tenant died, and the distribution must be made to the next of kin according to the statute as it stood at that time.”

This rule was followed in *Fisk v. Fisk*, 60 N. J. Eq. 195, 46 Atl. 538; *In re Kohler's Estate* (1901) 199 Pa. 455, 49 Atl. 286; *In re Warne's Estate* (1931) 302 Pa. 386, 153 Atl. 688; *Angarica's Estate*, 282 N. Y. S. 627; and *New York Life Insurance Co. v. Winthrop*, 237 N. Y. 93, 142 N. E. 431.

The court in *In re Kohler's Estate*, *supra*, explained its ruling by stating that “a testator who commits the distribution of his estate to the law upon the happening of an event necessarily future must reasonably be presumed to have contemplated the possibility of a change in the law in the meantime.”

8. The Judgment Below Does Not Violate Section 18-103 of the District of Columbia Code; But Follows the Interpretation Placed on that Section by This Court in *Costello v. Costello*.

The appellant in No. 9405 claims that the judgment below violates section 18-103 of the Code because that section provides that “no right in the inheritance shall accrue to or vest in any person other than the children of the intestate and their descendants, unless such person is in being and capable in law to take as heir at the time of the intestate's death”.

Appellant cites no authority to support this contention; but there is a controlling authority to the contrary—the decision of this Court in *Costello v. Costello*. In that case this Court held that the brother Jeremiah should be excluded from the class of “heirs” (contrary to the statutory definition), and that Jeremiah's son should be included as an “heir” (also contrary to the statutory definition). Since Jeremiah's son was not “capable in

law to take as heir" at the time of the death of the testatrix (his father being still alive at that time), the decision of this Court appears to be open to the same objection that the appellant directs to the judgment below in the instant case. In fact, the same objection (alleged violation of section 18-103 of the Code) was raised in the *Costello* case, and made the subject of topic heading VI of the appellant's brief in that case (No. 8874 in this Court), and this Court may be presumed to have considered that contention and to have rejected it, although no mention of this point is made in the decision.

Section 18-103 really has no application to this case (or to the *Costello* case) except in so far as it constitutes a part of the statutory definition of the term "heirs", which (as appellant's brief so ably demonstrates) must yield to the intention of the testator. These appellees are not claiming a "right in the inheritance" of an "intestate". They claim that they are the devisees of a testator; that section 18-103 does not prohibit a testator from devising a future interest to persons to be born after his death; and that the rights of the appellees depend on the intention of Lorin M. Saunders, as disclosed in his will. In this case, as in the *Costello* case, the intention of the testator was that the statutory definition of the word "heirs" (including section 18-103) be applied as of the date of the death of the life tenant, rather than as of the date of death of the testator.

Many other cases from other jurisdictions, if produced and analyzed, would show the same result. One example may suffice.

In *DeWolf v. Middleton*, 18 R. I. 810, 31 Atl. 271, 31 L. R. A. 146 (1893) the testator devised the remainder of his estate to his "heirs at law" after the death of his two daughters without issue. One of his sons was an alien, and was for that reason not capable of taking or hold-

ing real property under the laws of Rhode Island either when the will was made or when the testator died in 1829. In 1863 the law of Rhode Island was changed by statute to permit aliens to take and hold real estate. In 1890 the last life tenant died; and the court held that an alien son of the alien son (a grandchild of the testator) was one of his "heirs at law", ascertained as of the date of the death of the life tenant. This grandson was not capable in law of taking at the time of the testator's death for two reasons: (1) because his father was still living at that time, and (2) because both he and his father were aliens. But the court held that there was no violation of the law in determining him to be an heir as of the death of the life tenant, because, as the court said (quoting from an earlier decision), the heirs were "to be ascertained on the hypothesis that the testator lives up to and dies at the period of distribution".

9. The Judgment Below Was in Accordance With the Provisions of Section 18-105 of the Code as Interpreted by this Court in *Costello v. Costello*.

The law in effect at the date of death of Julia I. Saunders (February 7, 1942) was Section 18-105 of the District of Columbia Code (1940), which provides that—

"Whenever those entitled to share in the estate in fee simple in lands, tenements, or hereditaments in the District of Columbia, of an intestate, are all in the same degree of kindred to the intestate, they shall take per capita or by persons; and, where a part of them are dead and a part living, the issue of those dead shall take per stirpes or by stocks the shares of their deceased parents."

This Court interpreted Section 18-105 in the following language in *Costello v. Costello*:

"The question for decision is whether the property covered under Item 2 passed under her will

to her heirs as determined at the time of *her* death, or to her heirs as determined at the death of her brother Jeremiah. The importance of the question is that if the former be the result, two of the nephews would take one-fourth each and the eight others would each take one-sixteenth (i. e., they would take *per stirpes*), whereas the latter result would give each of the ten an equal share (i. e., they would take *per capita*).” (At this point in its decision this Court cited section 18-105 in a footnote.)

The decision, as is readily seen, applies Section 18-105 as if the testatrix had died immediately after the death of her brother, and interprets the statute to mean that since at that time those entitled to share were “all in the same degree of kindred” to the testatrix (being all nephews and nieces) they would take *per capita*; but if those entitled to share had consisted of the brother Jeremiah and the children of the deceased brothers, the brother Jeremiah would have taken *per capita* one-fourth, and the children of the three deceased brothers would have taken *per stirpes* of their parents, one-fourth to one and one-sixteenth to each of the other eight.

In its application to the facts of the Saunders case, the decision in the *Costello* case means that the brothers and sister of Lorin M. Saunders having all died prior to the death of the life tenant, the nephews and nieces take in their own right (just as did the nephews and nieces in the *Costello* case), and not by representation of their deceased parents; and that the issue of any deceased nephew or niece will take *per stirpes* the share of their deceased parent. That is what the court below held. The only additional feature in the Saunders case was the fact that some of the nephews and nieces were dead leaving issue; and the court below held, in effect, that the grandnephews and grandnieces were not in the same degree of kindred as the nephews and nieces, and should take by representation of their deceased parents. This

seems to be in conformity with the standard charts of consanguinity (see page 38 of Mersch's Probate Court Practice in the District of Columbia, where nephews and nieces are listed in the 3rd degree of consanguinity, and grand-nephews and grandnieces in the 4th.)

CONCLUSION

The judgment below is correct and should be affirmed, with leave to the descendants of Juliet Saunders Leach to establish their identities and relationships to Lorin M. Saunders and their respective rights under the terms of the judgment.

Respectfully submitted.

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No. 9404 **FILED** JUN 23 1947

**SECOND BRIEF FOR MILDRED FRANCES SAUNDERS
AND OTHER APPELLEES.**

CLERK

United States Court of Appeals

DISTRICT OF COLUMBIA

CENTRAL DISPENSARY AND EMERGENCY HOSPITAL OF THE
DISTRICT OF COLUMBIA, et al., *Appellants*,

v.

MILDRED FRANCES SAUNDERS, et al., *Appellees*.

Appeal from the District Court of the United States for
the District of Columbia

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Appeal from the District Court of the United States for
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SECOND BRIEF FOR MILDRED FRANCES SAUNDERS AND OTHER APPELLEES.

This brief is filed on behalf of all of the appellees except Norman B. Saunders, Alfred E. Leach, and Mildred J. Kayser, who are represented by other counsel. It is filed in reply to the Reply Brief for Appellants, and particularly in reply to their contention that this Court in its decision in *Pyne v. Pyne*, 154 F. (2d) 297, failed to interpret the Maryland rule correctly, and that the Maryland rule (as interpreted by appellants) should be followed rather than the rule laid down by this Court in *Pyne v. Pyne*. (Reply Brief, pages 2, 3, 7, 8).

Certain other contentions in the Reply Brief which were directed to our former brief will be discussed very

briefly. Material directed to the brief previously filed on behalf of Norman B. Saunders is not being discussed herein.

In their first brief the appellants took the position that the 6th paragraph of the will of Lorin M. Saunders devised an "alternative vested remainder" to Fenton "or his heirs"; and that such alternative vested remainder was not subject to defeat by the failure of Fenton to attain the age of twenty-five years or to survive his mother, or by the substitute devise in the 8th paragraph to the "heirs at law" of the testator in the event Fenton died without leaving issue prior to the death of his mother.

In our former brief we pointed out that the words "or his heirs", which were relied upon by the appellants as creating an alternative vested remainder, should probably be read "and his heirs"; but that in any event the devise in the 6th paragraph (whether it created a contingent remainder or a vested remainder) failed to prevent the substitutional provisions of the 8th paragraph from becoming effective, because the conditions on which the devise of the remainder to the son in the 6th paragraph depended never happened, while those on which the substitutional devise to the heirs at law in the 8th paragraph depended did happen. We submitted that under the rule laid down by this Court in *Pyne v. Pyne*, 154 F. (2d) 297, and *Costello v. Costello*, 80 U. S. App. D. C. 75, 149 F. (2d) 379, the "heirs at law" of the testator, should be ascertained as of the date of death of the life tenant (the widow) rather than as of the date of death of the testator.

In *Pyne v. Pyne*, supra, this Court entered into a full discussion of authorities in other jurisdictions (and particularly of the Maryland authorities), and reached the conclusion, among others, that the Maryland rule is that where a life estate, or a term of years, intervenes, references to substitution in the event of the death of the re-

mainderman *without issue, or with issue surviving*, are construed to refer to the period prior to the death of the life tenant.

But appellants in the first paragraph of their reply brief take issue with the conclusion of this Court as stated above; and assert that if the 8th paragraph of the Lorin M. Saunders will was intended as a substitute provision for the disposition of the remainder of the estate in the event the preceding devise of the remainder to the son should fail because of his death without issue before the death of his mother, then the case falls squarely within the rule announced in the Maryland cases of *Lumpkin v. Lumpkin*, 103 Md. 470, 70 Atl. 238, and *Godwin v. Kemp*, 129 Md. 159, 98 Atl. 495.

It is interesting to note in this connection that this Court considered and analyzed the Maryland cases of *Lumpkin v. Lumpkin* and *Godwin v. Kemp* in its decision in the *Pyne* case, and distinguished them from cases "where a life estate or a term of years intervenes", (1) on the ground that in the two Maryland cases the devise "was in part direct and in part a remainder, with the clause referring to death relating to both interests" and (2) on the ground that in those cases "the Court found the intent of the testator in the fact that both direct devise and remainder were treated alike". (See page 302 of the decision in the *Pyne* case and footnote 12, in which *Lumpkin v. Lumpkin* and *Godwin v. Kemp* are discussed.

If, in the Saunders case, Lorin M. Saunders had by the 6th paragraph of his will devised one half of his estate directly to his son in fee, and had devised only the other one-half to his wife for life with remainder over to the son, then the problem of interpreting the 8th paragraph would be more nearly similar to that involved in the two Maryland cases under discussion. But that is not our present problem; and it is quite clear from the entire opinion of this Court in the *Pyne* case that the Maryland

rule (as interpreted by this Court) is in full harmony with the conclusion reached by this Court in the *Pyne* case; and that the two above mentioned decisions are not in conflict with that conclusion. That conclusion, as stated by this Court in the *Pyne* case, is that "where a will refers to the death of a remainderman survived by issue, without specification as to time, his death prior to the death of the life tenant is meant." (P. 301 of the opinion).

Appellants also argue (Reply Brief, pp. 7, 8) that since the *Pyne* case did not involve *death without issue*, but involved *death with issue surviving*, the statement of this Court that the same rule is applicable to both types of cases was not necessary to the decision, and that, therefore, the Maryland rule (which appellants contend is to the contrary) "would seem to be quite persuasive". The effect of their argument (although they do not draw that conclusion in such plain language) is that an *obiter dictum* of this Court is of less authority in this jurisdiction than a direct precedent in a Maryland case. Without conceding this conclusion, we wish to point out (1) that neither this Court nor the Courts of Maryland make any distinction in principle between "death without issue" cases and "death with issue surviving" cases; (2) that the Maryland cases of *Lumpkin v. Lumpkin* and *Godwin v. Kemp* are not direct precedents in the Saunders case, this Court having expressly distinguished them on the facts from cases where a life estate or a term of years intervenes, as in the Saunders case (see previous discussion herein); and (3) that the ruling of this Court in the *Pyne* case was not in the nature of *obiter dictum*, as the Court found that the basic principles applicable to "death without issue" cases were applicable equally to "death with issue surviving" cases and applied them to the *Pyne* case.

The following language is quoted from pages 302 and 304 of the decision in the *Pyne* case:

“Running through the Maryland cases, we find the doctrine that where a life estate, or a term of years, intervenes, references to substitution in the event of the death of the remainderman *without issue, or with issue surviving*, are construed to refer to the period prior to the death of the life tenant.” (Italics supplied)

“The expression in the will before us is not death ‘without issue’ but death ‘leaving a descendant’, and the vast majority of the reported cases in this field concern limitations upon failure of issue. The learned framers of the ‘Restatement of the Law of Property. Future Interests.’ treat the expressions ‘die without issue’ and ‘survived by issue’ equally as contingencies *and apply the same rule in determining the effective time of such expressions*, and we agree with them to the extent of believing that the basic principles of ‘without issue’ cases are helpful in construing limitations upon death leaving descendants surviving”. (Italics supplied)

In this connection, it will be noted that the case of *McArthur v. Scott*, 113 U. S. 378, cited on page 3 of appellants’ reply brief, was also considered by this Court in the *Pyne* case and distinguished in the following language:

“The two Supreme Court cases mentioned are not helpful in the problem before us, because both of them contained phrases definitive of the time. The language in the will in *McArthur v. Scott* was ‘if any grandchild aforesaid shall have died before said final division’, * *” (p. 303).

And in the case of *Richardson v. Penicks*, 1 App. D. C. 261, discussed on pages 4 and 5 of Appellants’ Reply Brief, the following language of the Court shows that while the Court did hold that the son took a vested remainder in that particular case, it also held that this vested remainder was *subject to defeasance in the event the son failed to survive the life tenant*:

“To hold that George R. Lawrie took a vested remainder in the house and lot in controversy after the

life estate of the testator's mother, to come into enjoyment upon arrival at majority, *and subject to defeasance by his death before hers*, in which event it would pass to Sarah J. Penicks, is more in accord with the general intention of the testator, as it appears to us from the whole will, than any other conclusion to which we have been urged." (Italics supplied—p. 265 of the decision).

On page 15 of their reply brief appellants refer to an exhibit attached to their own complaint in the Court below and alleged by them in the 9th paragraph of their complaint (App. 11, 34, 35) to be "a true copy" of a schedule signed by the widow Julia I. Saunders under date of January 9, 1937, in the following language:

"This claim is based largely upon a paper, dated January 9, 1937, *alleged to have been written by the widow* giving a list of the properties then remaining out of those received from the estate of her husband. (App. p. 34). This writing is not mentioned or referred to in the will of the widow or in either of the codicils thereto. No acts or conduct on the part of the widow are shown, tending to indicate, that she placed such construction or any particular construction upon the will of her husband." (Italics supplied).

If the purpose of the foregoing language is to cast doubt upon the truth of the appellants' own allegation in their complaint that the schedule of January 9, 1937, was signed by the widow, it is submitted that they may not now be heard to do so, or to refer slightly to their own exhibit as an "alleged" paper. While it is true (as stated by appellants) that this schedule of property received from her husband was not expressly referred to in her will or codicils, having been signed subsequent to the execution of the will and codicils; it is equally true that the schedule did expressly refer to the will; and that the two were tied together with reasonable certainty by the following mutual provisions:

1. Her will, dated November 7, 1927, provided that "The property which I received from my late husband is to be distributed in accordance with the terms of his will." (App. 26)

2. The schedule of property signed by her on January 9, 1937, was introduced by the following explanation:

"Pursuant to and in exercise of the powers conferred on me by the Last Will of Lorin M. Saunders, I have used a part of that estate for my support and maintenance during my lifetime. The following is the schedule as of January 9, 1937, of all the property which remains out of that received by me from the Lorin M. Saunders Estate, which schedule is referred to in my Will of November 7, 1927:" (App. 34)

The fact that she deemed this property to be set aside for her husband's relatives after her death and expected them to receive it, is, we submit, further evidenced by the fact that in her will she bequeathed substantial sums of money to her own nephews and nieces, grandnephews and grandnieces (App. 21); but appears to have made no provision whatever for any of her husband's relatives, appellees herein (App. 20-33), except (as appellees contend) the provision that the property which she received from her late husband is to be distributed in accordance with the terms of his will.

It is respectfully submitted that the judgment of the District Court was correct and should be affirmed.

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Frances Saunders and
others, Appellees.*

REPLY BRIEF FOR APPELLANTS

IN THE
United States Court of Appeals

DISTRICT OF COLUMBIA.

No. 9404

CENTRAL DISPENSARY AND EMERGENCY
HOSPITAL, ET AL., *Appellants,*

v.

MILDRED FRANCES SAUNDERS, ET AL., *Appellees.*

Appeal from the District Court of the United States for the
District of Columbia.

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United States Court of Appeals
for the District of Columbia

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HOSPITAL, ET AL., *Appellants*,

v.

MILDRED FRANCES SAUNDERS, ET AL., *Appellees*.

Appeal from the District Court of the United States for the
District of Columbia.

REPLY BRIEF FOR APPELLANTS.

1. The appellees, Mildred Frances Saunders, et al., in the first division of their brief, page 9, argue that paragraph 8 of the will of Lorin M. Saunders was intended as a substitute provision for the disposition of the remainder of the estate in the event the preceding devise of the remainder to the son should fail because of his death without issue before that of his mother. If this contention of ap-

pellees be conceded the case falls squarely within the rule announced in the decisions of the Maryland Court of Appeals in *Lumpkin v. Lumpkin*, 108 Md. 470, 70 Atl. 238 and *Godwin v. Kemp*, 129 Md. 159, 98 Atl. 495.

In *Godwin v. Kemp*, *supra*, the estate consisted of real and personal property, as in this case. The will devised four-tenths of the estate to testator's wife for life and six-tenths to his children. By the third item of the will it was provided that *from and after the death of the wife*, the four-tenths devised to her was to be divided equally among the testator's five children, the child or children of any of said children of the testator who may die before the widow to take the share his or her parent would have taken. By the fourth item of the will it was provided that in the event of the death of any one of the five children, unmarried and without issue, his or her share was to go to and become the property of the survivors. The wife and all of the children survived the testator.

It was contended by the appellants, two grandchildren of the testator, that the children of the testator took only life estates, with remainder to the grandchildren. The appellees contended that the children took an estate in fee upon the death of the testator. In affirming the judgment for the appellees the court said:

"It is clear to us in this case that the fourth clause operated to defeat the estate of such children only as might die without issue in the lifetime of the testator, and as all the children in this case survived the father, each and all of them upon his death took under the will an absolute vested fee simple estate."

Item 4 of the will was held to be a substitute provision for the previous devises to the children, and, hence, as above shown, the children who survived the testator took a fee simple estate.

The same conclusion was reached in *Lumpkin v. Lumpkin*, *supra*, where the will devised to the testator's widow his dwelling house and its contents absolutely and also gave

her four-tenths of his entire estate for life with remainder to his children to be equally divided among them. The will further gave to each of his five children one-tenth of his estate, the remaining one-tenth in trust for his grandchildren. The will then provided that "in case of either of my children's death without leaving lawful issue, then I will and direct that their portion or inheritance in my estate shall be equally divided between my wife and my surviving children." The appellants contended that the death therein referred to of a child without issue meant such a death in the lifetime of the testator, while the appellees insisted that it meant such a death whenever it should occur.

In reversing a judgment for the appellees the court said:

"The law, it may be conceded, favors the early vesting of estates, and the courts will, as a general rule, where there is more than one period mentioned, adopt the earlier one, if there be no expressions, or no intent plainly deducible from the terms used, indicating that the testator meant to select the later, and not the earlier, period. * * * We think that the testator, having, in the earlier part of his will, given absolutely to his children, in specified portions, nine-tenths of his estate, subject to his wife's life interest in four-tenths, intended by the clause in question only to provide alternative beneficiaries for the shares of any of his children who might predecease him without leaving issue to represent them at the distribution of the estate, and did not intend to cut down to life estates or defeasible fees the shares which he had given to his children absolutely."

The will here involved does not provide that the estate devised to Fenton by the 6th paragraph of the will was to be defeated if he died without issue before the death of his mother. If such had been the intention of the testator he could easily have expressed it in unmistakable terms. The words "after the death of my wife", appearing in paragraph 8 of the will refer to and confirm the life estate devised to the wife by the earlier provisions of the will, and do not plainly indicate an intention on the part of the

testator to thereby fix the date for the ascertainment of his heirs as of the time of the death of his wife.

He did not say my then heirs at law, or my heirs at law living at Julia's death, or my heirs at law to be determined as of the date of death of my wife, or to my *next surviving heirs*, as in *Calles v. Ripley*, 161 Va. 472, or to such persons as would then be entitled under the laws of the District of Columbia if I had died intestate, as in *Warne's Est.*, 302 Pa. 386, or to such persons as may, at the time of the death of my wife, be my heirs at law, as in *Costello v. Costello*, 80 U. S. App. D. C. 75, all of which last mentioned cases are cited and relied upon by the appellees.

2. The appellees in the second division of their brief contend that the estate devised to Fenton by the 6th paragraph of the will was contingent on his surviving his mother and attaining the age of 25 years before her death, and that the estate devised by paragraph 7 of the will was contingent upon the son surviving his mother and attaining the age of 25 years after her death.

Since the will gave the son the use of the estate for purposes of maintenance and education beginning with the date of the death of the testator, it would seem clear that it was not the intention of the testator that the son should take nothing under the will unless he attained the age of 25 years. Is it not more reasonable to conclude that the testator merely meant by the provision in question to defer only the enjoyment of the estate by his son and not the vesting thereof in him?

In *Richardson v. Penicks*, 1 App. D. C. 261, the testator devised a house and lot to his mother for life, and *after her death* to his son *upon his attaining his majority*. The will also provided that if the mother should die before the son reached 21 years of age the rents and profits therefrom should go to the sister of the testator until the son attained that age, and if the son died before the mother then the property was to go to the sister upon the death of the mother. The son survived the testator's mother but died

intestate, without issue, before attaining the age of 21 years, leaving his aunt as his sole heir at law. In holding that the son took a fee simple estate which upon his death descended to his aunt this Court said:

“Examining the will in the light of these well-established rules, we cannot find that the testator intended that no interest should vest in his son, George R. Lawrie, unless he should live to become twenty-one years of age. Failing to find a clear manifestation of this intent, we must hold that it was the enjoyment, only, of the devised estate which depended upon this contingency. The use of the words ‘*after her death*’, and ‘*upon his attaining his majority*,’ cannot be held to change this from a vested into a contingent remainder without violating one of the rules above recited. His mother, and his son, George R. Lawrie, presumably his only child, were the principal objects of the testator’s bounty.”

See also:

Poor v. Considine, 6 Wall. 458.

McArthur v. Scott, 113 U. S. 378.

3. Under the third point of the brief of appellees Mildred Frances Saunders et al., page 13, it is argued that the word “or” appearing in the 6th paragraph of the will should be read “and.” It is not contended that the word “or” was inadvertently used, or that there appears in the will any language which would justify the substitution of the word “and” for “or”, thereby defeating the alternative estate to Fenton’s mother in the event of his failure to take.

In *Travers v. Reinhardt*, 205 U. S. 423, 430, 431, 51 L. Ed. 865, 869, an appeal from a judgment of this Court, 25 App. D. C. 567, the court said:

“It is contended here, as it was in the courts below, that the words in the above general provision, that ‘if any of my sons should die without leaving a wife or child or children living at his death,’ should be interpreted as if it read ‘if any my sons should die without leaving a wife *and* child or children living at his death.’”

The court is thus asked, by interpretation, to substitute the word 'and' in place of 'or' in the above sentence.

Looking at all the provisions of the will, and ascertaining, as best we may, the intention of the testator, we perceive no reason for interpreting the words used by him otherwise than according to their ordinary natural meaning. * * * Mr. Justice Story, speaking for this court, said that effect must be given 'to all the words of a will, if by the rules of law, it can be done. And where words occur in a will their plain and ordinary sense is to be attached to them, unless the testator manifestly applies them in some other sense.' * * * It would seem clear that the words 'without leaving a wife or child or children,' where they first appear in the above general provision, were purposely chosen. They appear three times in the will, and their usual meaning is not doubtful. We think the testator meant 'or', not 'and.' The court would not be justified in making the proposed substitution unless the whole context of the will plainly and beyond question requires that to be done in order to give effect to the will of the testator."

In the brief of appellee Norman B. Saunders, pages 17, 21 and 22, it is argued that in using the words "his heirs" in paragraph 6 of the will, the testator meant Fenton's issue. If this contention be sound then it would seem to follow that this devise to Fenton was of an estate tail general which was converted by the statute into a fee simple.

In *Dengel v. Brown*, 1 App. D. C. 423, the testatrix gave and devised to Mary Ann Dengel part of Lot 13 in Square 400, "the said premises at her decease to descend to her lawful heirs; and should she die without legal issue, then, in that case, the said premises shall revert to my estate."

This Court said:

"But for the limitation over, upon the dying of Mary Ann Dengel 'without legal issue,' the preceding devise to Mary Ann Dengel would be plainly a devise in fee simple. * * * But, in what follows, it appears that the word 'heirs' was intended to be restricted to mean heirs of the body, or issue of the body; and, therefore, instead of a fee simple, an estate in fee tail general,

according to the common law, was devised. 3 Jarm. on Wills, 94; Dallam v. Dallam, 7 H. & J., 220; Watkins v. Sears, 3 Gill, 492. And this estate tail general, by operation of the act of Maryland of 1786, Ch. 45, to direct descents, and which is in force in this District, is converted into a fee simple estate; and, consequently, Mary Ann Dengel took by the devise to her an estate in fee simple."

See also:

Young v. Munsey Trust Co., 72 App. D. C. 73.
Pyne v. Pyne, 154 F. (2d) 297.

The appellees cite in support of their contention the case of *Jewell v. Graham*, 57 App. D. C. 391. In that case there was a devise to the brother and sisters of the testator for life, with remainder to such of their children and descendants as may be living at the death of the survivor of the life tenants. The daughter of one of the life tenants died without issue, but testate, before the death of the surviving life tenant. It was held that the daughter having pre-deceased the surviving life tenant, her legatee took nothing.

There are no provisions in the will here under consideration to the effect that Fenton's estate should be defeated if he died before reaching 25 or before the death of his mother.

4. In division 4 of the brief of appellees Mildred Frances Saunders et al. it is argued that the instant case is controlled by the decision of this Court in *Pyne v. Pyne*, *supra*. The facts in that case are quite different from those of this case. There the devise involved was to three of the sons of the testatrix, John, Charles and Henry, their heirs and assigns forever, share and share alike. It was then provided that in case any one of said three sons should die, leaving a descendant or descendants, said descendant or descendants should take the share his, her or their parent would have taken had he lived. John Pyne died leaving a

grandchild, the daughter of his deceased son. In the course of the opinion the Court said: "In the case at bar, the intention of the testatrix in the controversial sentence is *not indubitably certain*, but there are signs which are helpful."

The Court then proceeds to direct attention to certain provisions of the will, which, in its judgment, disclosed an intention on the part of the testatrix that in the event any of her sons died leaving a descendant, the latter should take the devise previously given to his or her parent.

In the will there under consideration the words "die without leaving lawful issue" were not present, but the Court discussed the effect of such words appearing in a will where there was a preceding life estate. The discussion would appear not to have been necessary to the decision of the case. The Court referred to *Lumpkin v. Lumpkin* and *Godwin v. Kemp, supra*, which appear to be the latest Maryland cases touching the subject here involved. As previously shown, the Maryland Court of Appeals in both of those cases held that in the absence of a plain intention to the contrary, the expression "die without leaving lawful issue" referred to a death in the lifetime of the testator, and not to that of the life tenant.

Since we acquired our law of wills very largely from Maryland, these cases would seem to be quite persuasive.

5. In division 5 of the brief of the appellees Mildred Frances Saunders et al. it is contended that the decision of this Court in *Costello v. Costello*, 80 U. S. App. D. C. 75, is controlling. It is believed that the difference between the language in the Costello will and that in the will of Lorin M. Saunders is clear. In the former the testatrix provided "after the death of my brother, Jeremiah Costello, I give and devise the real estate devised to him, for life, in the second item hereof, to such persons as may at the time of the death of my said brother be my heirs at law, in fee simple and absolutely."

The language used would seem clearly to point to a date beyond the death of the testatrix for the ascertainment of

her heirs at law. It was so held by the court below and by this Court. The words "may at the time of the death of my said brother" are words of futurity, and seem to indicate clearly that the heirs of the testatrix were not intended to be ascertained at the date of her death.

In the case of *Calles v. Ripley*, 161 Va. 472, cited by the appellees Mildred Frances Saunders et al., there was a devise to the wife of the testator for life, then to his son for life, and should he die leaving no lawful issue of his body, then "to be equally divided with my *next* surviving heirs." It was held that the language quoted clearly showed the testator's intention that his heirs should be ascertained as of the date of the death of his son.

The court distinguished the cases of *Allison v. Allison*, 101 Va. 537, 44 S. E. 904, 906, and *Cottrell v. Mathews*, 120 Va. 847, 92 S. E. 808, 809. In the former case there was a devise of residuum of the estate to the daughter for life, and at her death to her children, but if she should die without issue, then "to be divided to my heirs at law according to the law of the State of Virginia." It was held "heirs at law" were those answering that description at testator's death. The court said: "It will be observed that no words of survivorship are contained in the bequest construed in the Allison case, nor any words of limitation, or other language in the will, to designate the time the testator's heirs at law were to be ascertained, the testator merely stating that the property should be divided among his heirs at law according to the laws of the State of Virginia."

In *Cottrell v. Mathews*, *supra*, the will provided that at the death of the testator's wife his estate be equally divided between his surviving children. It was held: "Words of survivorship in a will are to be construed to relate to the testator's death, rather than to that of a life tenant, unless a contrary intent clearly appears."

In *Warne's Estate*, 302 Pa. 385 cited by appellees there was a devise to the wife for life and a spendthrift trust of the income from the estate for the sons after the death of

the wife, and upon the death of both sons without issue remainder to "such persons as would be *then* entitled under the laws of this state if I had died intestate." The court found in the language used clear indication that the heirs of the testator were to be ascertained as of the date of the death of the surviving son.

In *Boston Safe Deposit & Trust Co. v. Waite*, 278 Mass. 244, and *Carter v. Martin*, 124 N. J. Eq. 106, cited by appellees the wills created spendthrift trusts of the income from the estate with remainder to the issue of the legatees, if any, and if no issue, then to the heirs at law and next of kin of the testator. The courts held that the intention of the testator in each case was clear that he did not intend the legatees to take the remainder of the estate as his heirs, because to do so would violate the provisions of the spendthrift trusts under which the legatees were entitled only to the income.

The case of *Johnson v. Askey*, 190 Ill. 58, was considered in the later case of *Himmel v. Himmel*, 294 Ill. 557, cited and digested on pages 25 and 26 of appellants' brief, where it was held that the fact that the life tenant was the only heir at law of the testator would not prevent his taking the remainder under a provision of the will that upon failure of issue of the life tenant, the remainder should go to the testator's heirs at law.

In the other cases cited by appellees Mildred Frances Saunders et al. because of the peculiar wording of the wills involved, the courts were able to ascertain the intention of the testator without resorting to rules of construction.

The appellees cite the cases of *Herrell v. Herrell*, 47 App. D. C. 30, and *Britton v. Thornton*, 112 U. S. 527, in support of their contention that the words "die without leaving lawful issue" mean a death at any time without issue. Because of the difference in the facts appearing in those cases from those present in the instant case it is believed they are not controlling.

In *Herrell v. Herrell*, the devise was to the grandson of the testatrix "provided that if my grandson should die without issue, then I devise and bequeath the share of my estate which would otherwise go to him to my daughter, Annie E. Ward, and my son, Henry W. Herrell, their, and each of their, heirs and assigns." The grandson, having thereafter left the District of Columbia and his whereabouts being unknown, the testatrix, by a codicil to her will, provided that the aforesaid devise to the grandson should lapse and become null and void, in the event of his death before that of the testatrix, or in case he should die before the testatrix's estate was settled. Thus it clearly appears that the time when the death of the grandson without issue must occur in order to defeat his estate was definitely fixed either as prior to the death of the testatrix, or before the settlement of her estate. There is no provision in the will now under consideration which definitely fixes the time when the death of Fenton must occur in order to defeat the estate previously devised to him by paragraph 6 of the will. The testator did not say that Fenton's estate should be defeated if he failed to attain the age of 25, nor did he provide that his son's estate should be forfeited if he died during the lifetime of his mother. Furthermore, in the *Herrell* case there was an express devise over to the daughter and son of the testator in the event the grandson did not take. It is therefore thought that the general rule should apply and the words be construed to mean death in the lifetime of the testator.

This Court cited the case of *Britton v. Thornton*, 112 U. S. 527, in support of its ruling. There the devise was to Eliza Ann Thornton "provided that, should the said Eliza Ann die in her minority and without legal issue then living, the lands hereby devised shall revert and become part of the residue of my estate hereinafter disposed of." Eliza Ann died in her minority and without leaving issue. Here, as in the *Herrell* case, the time when the death of Eliza Ann must occur in order to defeat her estate is definitely fixed at some period during her minority.

It is significant that the Supreme Court in its opinion referred to a decision of the Supreme Court of Pennsylvania in which it had reached the conclusion that Eliza Ann, having died during her minority without issue, took nothing under the will.

The appellee, Norman B. Saunders, division B, page 15 of his brief, claims that the usual and natural meaning of the word "heirs" should not attach to that word as used in the 8th paragraph of the will. In support of his argument he suggests, without apparent justification therefor in the record, that the will was prepared by one unskilled in legal terminology and in the drafting of wills. He then calls attention to several mis-spelled words appearing in the will. It does not appear from anything in the record that the typographical errors were those of the testator rather than those of the scrivener. In this connection it is significant that one of the witnesses to the will, Leo Simmons, was a member of the bar of the District of Columbia of long standing, and then actively engaged in the practice of his profession. It would therefore appear more likely that the will was prepared by Mr. Simmons rather than by the testator.

In division C, page 15, of the brief of the appellee, Norman B. Saunders, he argues that Fenton was not to receive any part of the estate until he reached 25 years of age. This contention was discussed in appellants' original brief and also in the earlier part of this reply brief.

In *Anderson v. Brower*, 148 Minn. 44, cited by appellee, the will devised the residue of the testator's estate to his adopted son, to be paid to him when he reached 30 years of age, if the testator's executors deemed it advisable. Should my executors not deem it advisable to pay over to my adopted son, Willie J. Anderson, the residue of my estate upon arriving at the age of 30 years, in that event I direct that the portion to be paid to him when he reaches the age of 30 years, be paid to my legal heirs." The executors deemed it unwise to turn over the estate to the

adopted son and declined to do so. The question for determination was whether the wife, the statutory heir of the testator, was included in the words legal heirs." The court held that the testator meant by those words his blood relatives and not his wife. Thus it will be seen that the testator gave his estate to his adopted son upon the express condition that his executors should deem it advisable to turn the property over to him when he reached 30 years of age. In the instant case there is no such condition, the will clearly showing that it was the intention of the testator that the property should be turned over to Fenton either when he reached 25 or at the death of his mother.

In *McGinnis v. Campbell*, 274 Ill. 83, cited by appellee, the question for decision was whether the testator's widow, who was his statutory heir, was included in a devise to his "legal heirs." It was held that the language of the will clearly showed that the testator did not intend to include his wife as an heir.

In division B, page 19, of his brief, Norman B. Saunders cites the cases of *Herrell v. Herrell* and *Britton v. Thornton*, heretofore discussed in this reply brief.

In division E, page 21 of his brief, the appellee, Norman B. Saunders, contents that Fenton could not be the heir of his mother, and in support thereof cites Section 942 of the 1901 D. C. Code. This section of the Code relates only to estates acquired by descent and of which the decedent died intestate. It seems clear that Fenton did not take his estate by descent, nor did he die intestate thereof. On the contrary, his estate was acquired by purchase through his father's will and the question of heirship of his mother is therefore controlled by Code Sections 948 and 950, which are as follows:

"Estate acquired by purchase.—If the estate was acquired by the intestate by purchase, or descended to or vested in him in any other manner than as hereinbefore mentioned, and there be no child or descendant

of a child of such intestate, then the estate shall descend to his brothers and sisters of the whole blood and their descendants in equal degree equally.

Paternal and maternal ancestors alternately.—If there be no brother or sister of the whole or the half blood, or any descendant from such, then to the father, and if no father living, then to the mother. * * *

In *Young v. Munsey Trust Co.*, *supra*, this Court held that where a son took an estate under the will of his great grandmother and died intestate thereof, under Code Section 950, his estate descended to his mother as his heir.

The same conclusion was reached in *Crowell v. Chapman*, 257 Mass. 492, where testator's widow was his statutory heir. This case is also applicable upon the question as to the time when the heirs of the testator are to be ascertained. In that case there was a devise of certain lands to three of the testator's nephews and several minor bequests to others. The residue of the estate was devised to the testator's wife for life with absolute power and authority to sell, mortgage or otherwise dispose of the same without any obligation on her part to account. The testator left no descendants, but was survived by his widow, two sisters and several nephews and nieces. As to the remainder of his estate not used, expended or appropriated by his wife, his will provided: "And as to the final remainder of my said property and estate, real, personal or mixed, it is my will that the same be distributed according to law."

It was held that the nephews took a vested remainder in the residue of the estate at the date of the death of the testator, with possession deferred until the death of the widow, the life tenant. It was also held that the widow was the heir of the testator and entitled to participate as such in the distribution of the residue of his estate.

In discussing the effect of the language directing that the residuary estate be distributed according to law, the court said:

"If anything remained to be done the law could attend to it. Evidently he had no further care for what

happened. There is nothing to indicate that he considered whom the law favored or when these ultimate distributees were to be determined, * * *. Unless a clear intent to the contrary appears, the class will be determined as of the date of the testator's death, and the life tenant will share if then a member of the class."

The appellees argue that grave consideration should be given to the alleged acquiescence of the widow in the construction of the will of her husband contended for by the appellees. This claim is based largely upon a paper, dated January 9, 1937, alleged to have been written by the widow giving a list of the properties then remaining out of those received from the estate of her husband. (App. p. 34). This writing is not mentioned or referred to in the will of the widow or in either of the codicils thereto. No acts or conduct on the part of the widow are shown, tending to indicate, that she placed such construction or any particular construction upon the will of her husband. In her will she merely said "the property which I received from my late husband is to be distributed in accordance with the terms of his will". She did not in her will mention her husband's collateral relatives or allude to them in any way. There is nothing in this language to indicate that the widow placed the construction contended for by the appellees upon the will of her husband. On the contrary, the language used by the widow seems clearly to indicate that she had neither wish nor intention to attempt to construe the will of her husband as to the disposition he intended to make of his property; and this seems to be confirmed by the fact that the widow by reference made her husband's will a part of her own in so far as the disposition of the property she received from him was concerned. *Clark v. Dennison*, 283 Pa. St. 285. But even if she had attempted to place a particular construction upon his will, it could have no bearing upon the true judicial construction thereof which is to be ascertained from the language used by the testator.

However, even if the widow mistakenly believed that she had only a life estate in the properties formerly owned by her husband, when in fact she had the fee, such belief would not prevent the passing, under the residuary clause of her

will, of whatever interest she had to the appellants, unless a clear intent to the contrary appears.

The cases cited and relied upon by the appellees are not controlling. In *Evans v. Ockerhausen*, 69 App. D. C. 285, it appeared that for a considerable period of time no claim had been made by the children of the testator that they were entitled, rather than their mother, to the income from the estate. This Court said:

“We do not hold that such inaction bears directly upon a judicial determination of the intent of the testator expressed in the will, but mention it merely as a significant circumstance indicating their own construction of their father’s intent for many years after reaching their majority.”

In *Moore v. Moore*, 121 Ore. 48, cited by appellee Norman B. Saunders, page 23 of his brief, eight persons were interested in the construction of a will. They were unable to agree upon the interest to which each was entitled. They thereupon by agreement placed the property in the hands of a trustee, with instructions to distribute the income equally to the parties in interest. Later, one of the parties sold her interest in the estate, treating and conveying it as a one-eighth interest and receiving the purchase price therefor. Later she attempted to assert that her interest in the estate was greater than one-eighth. The court held in effect that she was estopped by her conduct to repudiate the position which she had taken and upon which the others had relied and acted.

There is nothing in the instant case that would justify the application of the principle relied upon by the appellees.

It is respectfully submitted that the judgment of the court below was erroneous and should be reversed.

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